

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS, LLC, et al.,	}	Docket No. 10 C 5711
Plaintiffs,		
vs.		
PACKAGING CORPORATION OF AMERICA, et al.,		Chicago, Illinois July 13, 2012 10:00 o'clock a.m.
Defendants.	}	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MAGISTRATE JUDGE NAN R. NOLAN
VOLUME 1-A

APPEARANCES:

For the Plaintiffs:

THE MOGIN LAW FIRM
BY: MR. DANIEL J. MOGIN
707 Broadway, Suite 1000
San Diego, CA 92101
(619) 687-6611

FREED KANNER LONDON & MILLEN LLC
BY: MR. MICHAEL J. FREED
MR. ROBERT J. WOZNIAK
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
(224) 632-4500

SCOTT & SCOTT
BY: MR. WALTER W. NOSS
707 Broadway, Suite 1000
San Diego, CA 92101
(619) 233-4565

Court Reporter:

MS. CAROLYN R. COX, CSR, RPR, CRR, FCRR
Official Court Reporter
219 S. Dearborn Street, Suite 1854-B
Chicago, Illinois 60604
(312) 435-5639

1 APPEARANCES CONTINUED:

2 For the Plaintiffs
3 (Cont'd)

GRANT & EISENHOFER
BY: MR. ROBERT G. EISLER
123 Justison Street, 7th Floor
Wilmington, DE 19801
(302) 622-7030

5 BERGER & MONTAGUE, P.C.
6 BY: MR. CHARLES PEARSALL GOODWIN
1622 Locust Street
7 Philadelphia, PA 19103
(215) 875-3000

8 LOCKRIDGE GRINDAL NAUEN PLLP
9 BY: MR. BRIAN D. CLARK
100 Washington Avenue S.
10 Minneapolis, MN 55401
(612) 239-6900

11 MILLER LAW LLC
12 BY: MR. MATTHEW E. VAN TINE
115 South LaSalle Street
Suite 2910
13 Chicago, IL 60603
(312) 332-3400

14
15 For Defendant Packaging
16 Corporation of America:
17 KIRKLAND & ELLIS LLP
BY: MR. LEONID FELLER
300 North LaSalle Street
Chicago, IL 60654
(312) 862-3144

18 For Defendant
19 International Paper:
20 FOLEY & LARDNER LLP
BY: MR. JAMES T. McKEOWN
MR. NATHAN EIMER
MR. TRENT M. JOHNSON
21 777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5530

22
23 EIMER STAHL LLP
24 BY: MR. NATHAN P. EIMER
224 South Michigan Ave., Suite 1100
Chicago, IL 60604
25 (312) 660-7600

1 APPEARANCES CONTINUED:

2 For Defendant
3 Temple-Inland:

MAYER BROWN LLP
BY: MR. ANDREW S. MAROVITZ
MS. BRITT M. MILLER
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

6 For Defendant
7 Cascades and Norampac:

K & L GATES LLP
BY: MS. LAUREN NORRIS
70 West Madison Street, Suite 3100
Chicago, IL 60602
(312) 372-1121

9 For Defendant
10 Georgia-Pacific:

QUINN EMANUEL URQUHART &
SULLIVAN LLP
BY: MR. STEPHEN R. NEUWIRTH
51 Madison Avenue, 22nd Floor
New York, NY 10010
212-849-7000

13 GEORGIA-PACIFIC
14 BY: MS. MARY K. McLEMORE
15 133 Peachtree Street, N.E.
16 P.O. Box 105605
Atlanta, GA 30348
(404) 652-4598

17 For Defendant
18 RockTenn CP, LLC:

WINSTON & STRAWN LLP
BY: MR. MICHAEL MAYER
MR. JOSEPH L. SIDERS
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5902

21 For Defendant
22 Weyerhaeuser Company:

McDERMOTT WILL & EMERY LLP
BY: MS. JENNIFER A. SMULIN DIVER
227 West Monroe Street, Suite 4400
Chicago, IL 60606

24

25

10:11:22 1 (The following proceedings were had in open court:)

10:11:22 2 THE COURT: Good morning, everyone.

10:11:28 3 THE CLERK: 10 C 5711, Kleen Products v. Packaging
10:11:32 4 Corporation of America.

10:11:34 5 THE COURT: Good morning. This is a case that was
10:11:36 6 referred from Judge Shadur for discovery supervision, so let's
10:11:40 7 begin with our plaintiffs, and we will have the plaintiffs
10:11:44 8 identify -- Mr. Mogin, will you introduce your team?

10:11:50 9 MR. MOGIN: I will. Good morning, your Honor.

10:11:50 10 THE COURT: Good morning.

10:11:52 11 MR. MOGIN: Dan Mogin for the plaintiffs, Michael
10:11:54 12 Freed for the plaintiffs, Robert Wozniak for the plaintiffs,
10:11:58 13 Chuck Goodwin for the plaintiffs, Robert Eisner for the
10:12:02 14 plaintiffs, and we have in the back Walter Noss, Brian Clark,
10:12:04 15 and Matt Van Tine.

10:12:06 16 THE COURT: Okay. Wow.

10:12:10 17 Mr. Goodwin, tell us who your -- who people
10:12:20 18 concentrate on too, that helps me, which defendant.

10:12:24 19 MR. MOGIN: I'm sorry. Mr. Eisner concentrates on
10:12:26 20 PCA.

10:12:26 21 THE COURT: Okay.

10:12:28 22 MR. MOGIN: Mr. Goodwin on Georgia-Pacific, and
10:12:32 23 Mr. Clark on RockTenn, and Mr. Van Tine on Temple-Inland.

10:12:38 24 THE COURT: Thank you.

10:12:46 25 And each of our seven defendants, we will have you

10:12:50 1 introduce yourselves individually with either if you have a
10:12:54 2 corporate representative with you or a co-counsel. We will
10:12:58 3 start with Mr. Neuwirth.

10:13:08 4 MR. NEUWIRTH: Good morning, your Honor; Steven
10:13:10 5 Neuwirth for defendant Georgia-Pacific, and I am pleased to be
10:13:14 6 joined today by Mary McLemore from Georgia-Pacific.

10:13:18 7 THE COURT: Okay. Thank you. Welcome, Ms. McLemore.

10:13:22 8 MS. McLEMORE: Good morning, your Honor.

10:13:24 9 MR. McKEOWN: Good morning, your Honor; James McKeown
10:13:24 10 for International Paper. With me today are my co-counsel,
10:13:28 11 Nathan Eimer from Eimer Stahl and my colleague, Trent Johnson,
10:13:30 12 from Foley & Lardner.

10:13:30 13 THE COURT: Good. Good morning, gentlemen.

10:13:34 14 MS. DIVER: Good morning, your Honor; Jennifer Diver
10:13:40 15 for Weyerhaeuser Company.

10:13:42 16 THE COURT: Thank you, Ms. Diver.

10:13:08 17 MR. FELLER: Good morning, your Honor; Leonid Feller
10:13:46 18 for Packaging Corporation of America.

10:13:48 19 THE COURT: Okay. Thank you, Mr. Feller.

10:13:48 20 MR. MAYER: Good morning, your Honor; Mike Mayer and
10:13:50 21 Joe Siders on behalf of RockTenn CP, LLC. I believe last time
10:13:52 22 Mr. McCareins said he wasn't going to be able to make it
10:13:56 23 today.

10:13:56 24 THE COURT: He did. I don't know how we will go on
10:13:58 25 without him.

10:14:02 1 MR. MAYER: We have Mr. Siders here.

10:14:06 2 THE COURT: Okay. Mr. Mayer and Mr. Siders from
10:14:08 3 Winston for -- but remind me, you're RockTenn?

10:14:14 4 MR. MAYER: Correct, your Honor.

10:14:14 5 THE COURT: Okay. Thank you.

10:13:08 6 MR. MAROVITZ: Good morning, your Honor; Andy
10:14:18 7 Marovitz and Britt Miller for Temple-Inland.

10:14:20 8 THE COURT: Thank you. Ms. Miller, hello.

10:14:24 9 MS. MILLER: Good morning, your Honor.

10:14:26 10 THE COURT: Okay.

10:13:08 11 MS. NORRIS: Good morning, your Honor; Laurie Norris
10:14:30 12 for Scott Mendel. Scott Mendel mentioned that he won't be
10:14:32 13 here today.

10:14:32 14 THE COURT: Right. Good.

10:14:34 15 We have Ms. Cox, who just got a fabulous new job with
10:14:38 16 our newest -- one of our newest district court judges, but she
10:14:46 17 missed you so much she left Judge Tharp and she came back
10:14:50 18 today, and she knows you all well.

10:14:50 19 And we still have this photo of you. You have seen
10:14:54 20 this photo, right? Didn't you see the photo? Where is the
10:14:56 21 photo?

10:15:00 22 THE CLERK: It's in the brown binder to the right.

10:15:02 23 THE COURT: The temporary reporter from last time,
10:15:06 24 she gave -- she found on the Internet every one of your
10:15:12 25 photos, just so you know, you all photograph very well. So

10:15:14 1 she said, Judge, just in case you need, here's like -- so I
10:15:20 2 said, Well, it looks like all the old mug shots from my old
10:15:24 3 life.

10:15:26 4 Well, welcome, everyone, today. We have the day set
10:15:30 5 aside, if needed, to have a working status here.

10:15:38 6 The first thing that I wanted to say since our last
10:15:40 7 status -- since the last status on June 22nd, we attempted to
10:15:56 8 summarize what I thought were discussions that we had had
10:16:00 9 during the day. I don't even know if I -- we did this without
10:16:04 10 the transcript too.

10:16:06 11 So in an effort to keep our level of cooperation
10:16:12 12 going, and which part of level of cooperation is also trying
10:16:18 13 to come up with creative ideas without a rule book on how to
10:16:24 14 do it, so we sent to you three proposals.

10:16:30 15 I want to emphasize to you, I have -- on this, I have
10:16:36 16 a horse in the race here called cooperation. None of these
10:16:40 17 three -- I was throwing them out as a means to open
10:16:48 18 discussion, so please do not think the judge thinks we should
10:16:50 19 be doing one of the three. And I think it really served the
10:16:56 20 purpose because I was very glad to see your responses. I
10:16:58 21 think it kind of helped phrase what the issues were.

10:17:02 22 So in today, I have received a consolidated
10:17:08 23 plaintiffs' response to these three and other issues they had,
10:17:14 24 and then I received a status report from each of the
10:17:20 25 defendants, and they are very helpful because in my effort to

10:17:24 1 give individual determination to each person, I am glad to get
10:17:28 2 that.

10:17:30 3 So yesterday Mr. Neuwirth, I thought in the same
10:17:40 4 spirit, sent a defendants' proposed order. I just want to
10:17:44 5 reassure -- we didn't write back to you, Mr. Mogin -- I
10:17:50 6 basically took it as like a suggested agenda. That's all I
10:17:54 7 took it as. And so, I mean, I thought it was -- Chris and I
10:17:58 8 have come up with an agenda for today. When I need the
10:18:04 9 lawyers to help me write a draft order, I will ask them to
10:18:06 10 help me write a draft order, but I was very glad to see -- I
10:18:10 11 thought it was like a last-minute sort of here you go. So it
10:18:16 12 meant nothing more than that to me, and I hope that satisfies
10:18:22 13 any concern you have. Does it?

10:18:26 14 MR. MOGIN: I appreciate the court's comments, your
10:18:28 15 Honor.

10:18:28 16 THE COURT: Okay. Now, in throwing those three ideas
10:18:38 17 out as a way to get going, I think two things came back. We
10:18:46 18 could look at the defendants' seven status reports, and we
10:18:50 19 could look at the plaintiffs' status report as a reaction to
10:18:52 20 the court's June 22nd order.

10:18:56 21 I think the one thing that is -- and each of the
10:19:02 22 defendants are in different positions -- some of them, mostly
10:19:04 23 the smaller ones, I think, are making more progress, and I
10:19:10 24 don't want to do anything here today to interfere with that
10:19:12 25 progress, and anything I am going to say, I am going to tell

10:19:16 1 you if it works for your client, it works, okay.

10:19:22 2 But I would say all seven defendants said, This has
10:19:28 3 been interesting, we have made a lot of progress, probably as
10:19:34 4 lawyers you have learned a lot trying to do discovery in this
10:19:38 5 fashion, but now it has come to a point, we are interested in
10:19:46 6 further cooperation if we can get global resolution is the
10:19:52 7 word all seven used. We need some global resolutions of some
10:19:58 8 of the issues that have been recurring issues that we are
10:20:02 9 working on.

10:20:04 10 I think the plaintiff helped us in his report because
10:20:10 11 I think the plaintiff is saying more in general, I want to
10:20:20 12 keep cooperating, but he hasn't said that the cooperation is
10:20:28 13 in exchange for final resolution of the issues. So I think
10:20:32 14 that these status reports have at least helped me crystallize
10:20:38 15 where the parties are. And, Mr. Feller, I am very glad you
10:20:42 16 are shaking your head agreeing with me because of all the
10:20:44 17 status reports, I thought yours was probably the most helpful
10:20:50 18 because it was so concrete.

10:20:56 19 So here's what Chris and I want to suggest today. We
10:21:00 20 have three major topics, I think, global resolution of
10:21:08 21 discovery issues, and with Mr. Feller's help, we are going to
10:21:12 22 talk about that.

10:21:16 23 Number two is what issues lend themselves to
10:21:20 24 sampling.

10:21:22 25 And three, what are we going to do about these

10:21:28 1 requests to produce.

10:21:28 2 On the global resolution of discovery issues, I think
10:21:36 3 we should have a little chat for a few minutes, and I think I
10:21:40 4 should -- I think the defendants ought to go to the jury room
10:21:46 5 next to me, talk for 45 minutes, I think the plaintiffs ought
10:21:50 6 to stay here after this discussion, and we ought to come back
10:21:54 7 and we ought to decide if there are some global resolution of
10:21:58 8 issues, if I understand what you are talking about, and we
10:22:02 9 decide as much as possible whether or not we can come up with
10:22:12 10 some resolution. We do almost the same thing with the
10:22:16 11 sampling. I am catching, and I know you're -- particularly
10:22:22 12 Mr. McKeown, is like knee deep into sampling that he's been
10:22:28 13 doing. I think some issues lend themselves to sampling. And
10:22:32 14 then, you know, as much as we can push off, we are going to
10:22:36 15 talk about the requests to produce, but there is a good
10:22:40 16 likelihood.

10:22:42 17 Now, the question is, at every step of the way, is it
10:22:48 18 time to start briefing and let's set the briefing; or should
10:22:52 19 we continue on in this fashion.

10:22:56 20 And then the fourth thing I'm hoping today is I have
10:22:58 21 a number of days available between now and my demise on
10:23:06 22 September 30th, we are going to pick the days today. And they
10:23:10 23 can be individual conferences or joint conferences, given you
10:23:14 24 go back to the office and talk about it too. But I am hoping
10:23:18 25 by the end of the day, we have a plan.

10:23:24 1 Any comment to that suggestion? Does that sound like
10:23:30 2 something you could do?

10:23:30 3 MR. NEUWIRTH: Just one question. As indicated in
10:23:32 4 the submission that we had made to the court, for a variety of
10:23:36 5 reasons, I am only able to stay today --

10:23:40 6 THE COURT: 4:00 o'clock. 3:30?

10:23:42 7 MR. NEUWIRTH: Actually, even a little earlier. I am
10:23:46 8 actually scheduled for a 2:30 flight, although -- I don't know
10:23:50 9 if what you talked about requires the whole day or whether
10:23:54 10 it's something we could -- I think we can assume we can
10:23:56 11 accomplish the agenda today in about three hours, but we may
10:24:00 12 be wrong.

10:24:00 13 THE COURT: All right.

10:24:02 14 MR. NEUWIRTH: But I was just going to suggest that I
10:24:04 15 think the defendants, as reflected in what we submitted to you
10:24:06 16 yesterday, have given a lot of thought to the types of issues
10:24:12 17 that may lend themselves to some global resolution, and I was
10:24:16 18 just going to suggest that maybe we don't need as long as 45
10:24:18 19 minutes. You may have something you want to do in the
10:24:22 20 interim, but it may be possible that we could at least deal
10:24:24 21 with that part of the agenda a little more quickly.

10:24:26 22 THE COURT: I have nothing, but I want the plaintiffs
10:24:28 23 to hear -- I mean, I just thought maybe it would go quicker if
10:24:34 24 you had a private caucus. I know that you met this morning.
10:24:40 25 Maybe you could read my mind and you have had your private

10:24:44 1 caucus already.

10:24:44 2 MR. NEUWIRTH: Well, I think we tried, and I think
10:24:46 3 your reference to the proposed order we sent as an agenda type
10:24:50 4 document is accurate because what we tried to do there, after
10:24:58 5 a lot of thought and work, was to come up with a set of
10:25:00 6 suggestions, which is really all they are, suggestions for
10:25:04 7 discussion, about how we might bring issues that we have been
10:25:08 8 working with you and the plaintiffs on throughout this year to
10:25:12 9 at least some interim resolution to try to take advantage of
10:25:16 10 what we can do with you while you are on the bench and also
10:25:20 11 set up a framework for moving forward.

10:25:22 12 And each of the issues, what we tried to do was come
10:25:24 13 up with something that defined, as best as we could, and,
10:25:28 14 again, without the benefit of your input, where we are, and
10:25:34 15 also a resolution process that would be relatively quick if
10:25:36 16 issues couldn't be resolved. Certainly, we assumed we would
10:25:40 17 have a discussion with you and the plaintiffs, but it was
10:25:42 18 meant to be a starting point to that discussion.

10:25:44 19 THE COURT: That's the way I took it. Okay.

10:25:46 20 All right. So you actually physically want to leave
10:25:48 21 at 2:00?

10:25:58 22 12:00?

10:25:58 23 MR. NEUWIRTH: If I could leave at 1:00, that would
10:26:00 24 be great.

10:26:02 25 THE COURT: Well, they can cover for you too. I

10:26:04 1 mean, that's the other thing. We have dragged an awful lot of
10:26:06 2 lawyers here, and I was happy to start, I think your
10:26:12 3 priorities are straight in your life, but we can -- and you
10:26:16 4 can get the transcript.

10:26:16 5 MR. NEUWIRTH: Just so you know, your Honor, it's not
10:26:18 6 disrespect for the court. I observe a Jewish Sabbath --

10:26:24 7 THE COURT: No, I know, and I heard that I kept you
10:26:26 8 here on other Fridays. I was very glad to have that
10:26:30 9 information.

10:26:32 10 MR. NEUWIRTH: Thank you.

10:26:32 11 THE COURT: So we will do what we can do, and you
10:26:40 12 have such great co-counsel, and your client is here too, so
10:26:44 13 she can also speak up. We will let her speak today.

10:26:48 14 Okay. To that, Mr. Mogin, is there anything you want
10:26:52 15 to say to Mr. Neuwirth's comment there? Are you leaving at
10:27:00 16 any time?

10:27:00 17 MR. MOGIN: I am not leaving.

10:27:00 18 THE COURT: Are you going shopping?

10:27:02 19 MR. MOGIN: My flight is not until 6:30, so we are
10:27:04 20 fine, your Honor.

10:27:10 21 THE COURT: All right. This is going to be from
10:27:14 22 Mr. Feller; we are going to hear from Mr. Feller just in a
10:27:16 23 moment to get us started with this. But Mr. Feller started
10:27:22 24 out with nine issues. The only way I disagree -- not
10:27:26 25 disagree, but the only thing I would change from Mr. Feller's

10:27:28 1 points are I think the fundamental issue here is search
10:27:38 2 methodology, and a number of the issues are related to search
10:27:42 3 methodology. And before anybody leaves today, I need to put
10:27:48 4 on the record some statements about search methodology.

10:28:00 5 My informal finding on search methodology -- and I
10:28:02 6 don't want somebody to look at this record and say, Well, why
10:28:06 7 the heck was the judge having litigation holds, matching --
10:28:14 8 null set dictionary, what did these things have to do with
10:28:18 9 search methodology? So I want to say something before we
10:28:24 10 begin on at least where I am on the search methodology.

10:28:30 11 I think another issue I saw was transactional data.
10:28:34 12 Another issue, what I heard the defendants saying is global
10:28:40 13 resolution. Another would be -- another would be time frames,
10:28:50 14 time period. I am taking RPDs, I am taking the requests to
10:28:54 15 produce, out of this. That's a separate discussion. And so I
10:29:02 16 think they are not just isolated issues. I think what I am
10:29:08 17 trying to get us to talk about are overreaching topics.

10:29:12 18 Now, Mr. Feller, you made a very compelling argument
10:29:18 19 on you're willing to do -- you give, in fact, two examples,
10:29:22 20 you stick your neck out, and you give two examples of what
10:29:30 21 you're willing to do if you have a global resolution. Tell me
10:29:34 22 what you mean by that.

10:29:34 23 MR. FELLER: That's exactly right, your Honor. I
10:29:36 24 think the frustration and the difficulty from PCA's
10:29:44 25 standpoint, I think I generally speak for defendants here, is

10:29:48 1 that we have been in a process with plaintiffs of negotiating
10:29:52 2 individual issue by individual issue that plaintiffs have
10:29:54 3 raised, and they're obviously entitled to raise any issues
10:29:58 4 they want, without any linkage between the issues in terms of
10:30:06 5 negotiations. And so from at least my standpoint, on each and
10:30:14 6 every single one of these issues, it seems to me I am
10:30:16 7 essentially negotiating against myself.

10:30:18 8 THE COURT: Okay.

10:30:20 9 MR. FELLER: Plaintiffs say, We'd like a data
10:30:24 10 dictionary. And I say okay. And then we start talking about,
10:30:28 11 Well, should that include a null set or not, and we are
10:30:32 12 talking about the data dictionary. And that's it. And then,
10:30:34 13 by the way, we give them the data dictionary and nothing comes
10:30:38 14 out of that and nothing is resolved. And these were, in the
10:30:40 15 status report, meant to be examples only. But, for example, I
10:30:48 16 think PCA has said, I think other defendants have said, We are
10:30:50 17 willing to work with you on time period, but the consequence
10:30:54 18 of that is we are going back further in time, there is many
10:30:58 19 more documents to go through, and so, you know, perhaps a
10:31:02 20 tradeoff there is that you agree on backup tapes, that we
10:31:06 21 don't have to go back on backup tapes.

10:31:10 22 You know, again, there's any number of linkages. We
10:31:14 23 think many of these issues are related, and that you could
10:31:16 24 come to a global resolution on them. And so that is -- you
10:31:22 25 know, I think to make further progress in the negotiations,

10:31:26 1 that is the sort of dialog we have to have in terms of what
10:31:30 2 plaintiffs are willing to give for some of their demands. I
10:31:34 3 mean, I think that's how negotiations generally work.

10:31:36 4 To date, and I think Mr. Mogin has been very candid
10:31:40 5 standing up in court and saying this, he is just not willing
10:31:42 6 to do that. And if that's the case, I think as your Honor
10:31:46 7 said, I think certainly for PCA, and, again, hopefully I speak
10:31:50 8 for defendants, our priority is hopefully not your demise, but
10:31:54 9 before you step down, to get closure, if we are going to do it
10:32:00 10 issue by issue, let's figure out what we need to brief issue
10:32:04 11 by issue and get it done so that everyone, plaintiffs and
10:32:06 12 defendants, have certainty, and now after close to two years,
10:32:10 13 we can start to move on to the substance of this case rather
10:32:12 14 than, you know, what I call discovery about discovery, which I
10:32:18 15 think, you know, hopefully we can move past at this point.

10:32:20 16 THE COURT: So your two examples, so that Mr. Mogin
10:32:26 17 has something concrete to at least, you know, kind of chew on
10:32:32 18 over here, the first one was -- the first one was defendants
10:32:40 19 provide null set data dictionary with plaintiffs' assurance
10:32:46 20 that this would resolve their concern about search term
10:32:48 21 validation.

10:32:50 22 MR. FELLER: Yes. So that's one --

10:32:52 23 THE COURT: Or if somebody had a suggestion. I mean,
10:32:56 24 that's the latest suggestion we have had on the table.

10:33:00 25 MR. FELLER: And I take that from you, the court.

10:33:06 1 THE COURT: Right, I know. And here I am sitting up
10:33:10 2 here throwing things out.

10:33:10 3 MR. FELLER: Yes.

10:33:10 4 THE COURT: Or -- if you took that from me, but if
10:33:20 5 there was another suggestion for a verification, then that
10:33:22 6 would close the subject on verification.

10:33:24 7 MR. FELLER: Absolutely, your Honor. And there's
10:33:26 8 actually a third example, and, again, here's sort of the
10:33:32 9 problem, and, again, just as an example, and I know we don't
10:33:36 10 want to deal with RPDs, necessarily, but we have also said we
10:33:40 11 are perfectly happy to give the IP sort of document that IP
10:33:44 12 provided if that resolves the parsing issue.

10:33:46 13 THE COURT: Right. Mr. Mogin said no to that.

10:33:48 14 MR. FELLER: Right, so, but then --

10:33:48 15 THE COURT: That's the reason, I think. And that's
10:33:52 16 why we are going to hear from people here today. I read
10:33:54 17 Mr. Mogin's response that was clear -- I don't think he has
10:33:58 18 said no to other things. He hasn't had a chance to say
10:34:02 19 anything. He said, no, that it could not be an alternative.
10:34:08 20 It might narrow it, it might bring you closer, but he is not
10:34:12 21 accepting it as an alternative. So then, given time, giving
10:34:20 22 -- you know, I feel like I know much more about the case than
10:34:22 23 the new judge that's going to be coming on, that's why I am
10:34:26 24 saying I think probably the requests to produce are probably
10:34:30 25 ready for briefing, unfortunately.

10:34:34 1 MR. FELLER: And, your Honor --

10:34:34 2 THE COURT: But I am open to doing anything here to
10:34:38 3 pull some of the other issues off if you get the kind of
10:34:44 4 closure.

10:34:44 5 MR. FELLER: Exactly.

10:34:44 6 THE COURT: Now, you mean closure issue by issue,
10:34:48 7 though, you are not talking that they have to agree to
10:34:50 8 everything or you want to go to briefing, do you?

10:34:58 9 MR. FELLER: No, no, no, your Honor. I think -- no.
10:35:00 10 And I think maybe to modify a little bit of what you said at
10:35:04 11 the outset, which is certainly search terms is a key issue. I
10:35:08 12 think the other sort of global category or bucket you could
10:35:14 13 put things in is, you know, the corpus of documents that are
10:35:18 14 going to be reviewed, and I think all sorts of things fall
10:35:22 15 under that: custodians, time period, backup tapes, all sorts
10:35:26 16 of issues.

10:35:28 17 And so, no, do I think, you know, we are going to
10:35:30 18 walk out of here with a global resolution on every discovery
10:35:34 19 issue and never raise it again? No, but I think what the
10:35:36 20 court has called phase one versus phase two, I think what we
10:35:42 21 would like is to, you know, get pretty close to being done on
10:35:46 22 phase one, which is to say defendants have made their
10:35:52 23 production, defendants are open to additional search terms,
10:35:54 24 defendants are open to additional custodians, defendants are
10:35:58 25 open to talking about time period and transactional fields,

10:36:02 1 but, again, those issues need to be resolved together at least
10:36:06 2 for phase one, and then whatever the standard is, whether it's
10:36:12 3 good cause or reasonable -- whatever it may be, if you need to
10:36:16 4 come back at some point when you have been through our
10:36:18 5 production and we need to talk about discrete issues, that's
10:36:20 6 fine, we are open to that.

10:36:22 7 THE COURT: Any defendant just dying to say anything
10:36:26 8 else, or has Mr. Feller as an opening kind of spoken for you?
10:36:30 9 Anybody want to say anything specific?

10:36:38 10 All right. Mr. Mogin, your reaction?

10:36:44 11 MR. MOGIN: Well, a couple things, your Honor, if you
10:36:46 12 wouldn't mind. You said that you were going to make some
10:36:50 13 comments regarding search methodology.

10:36:52 14 THE COURT: Would you like me to?

10:36:54 15 MR. MOGIN: No. In fact, I wanted to remind the
10:36:56 16 court that we have not finished the hearing with respect to
10:36:58 17 search methodology.

10:37:00 18 THE COURT: Well, no. That's why I am going to make
10:37:02 19 some comments.

10:37:02 20 MR. MOGIN: Okay. Our linguist has not testified yet
10:37:06 21 with respect to Boolean search and the particulars of the
10:37:12 22 Boolean search, nor have we finished with our
10:37:16 23 cross-examination of Mr. Regard. So if we are going to reopen
10:37:20 24 the search methodology issues, of course, that would be the
10:37:22 25 first thing that we would have to consider. But I want to

10:37:28 1 talk about that a little bit.

10:37:30 2 And I think that in order to understand where we are
10:37:34 3 and how we move forward, I think it's important to talk about
10:37:36 4 context. And in that regard, I think the first thing to talk
10:37:42 5 about is what happened at the close of the hearing and what
10:37:46 6 were the instructions that your Honor gave to the parties.
10:37:50 7 You did not just give those instructions to the plaintiffs,
10:37:52 8 you gave those instructions to the parties. And the
10:37:56 9 instructions that you gave were essentially work with your
10:37:58 10 experts and see if you can come up with a methodology within
10:38:02 11 the Boolean construct that you can be comfortable with. Tweak
10:38:10 12 it. That's what you said. And the plaintiffs, in fact, did
10:38:14 13 that, your Honor, at considerable expense, working with our
10:38:16 14 expert, Dr. Lewis, and others, and we did come up with a
10:38:20 15 proposal that would work within the Boolean context.

10:38:24 16 But the defendants did not respond. The defendants
10:38:26 17 did not come forward with their own proposal. Rather, their
10:38:30 18 response was the same response that you have been hearing and
10:38:32 19 that we, the plaintiffs, have been hearing for nigh on a year
10:38:38 20 and a half. And that response was, Take the documents that we
10:38:40 21 are going to give you, review them, and get back to us.

10:38:46 22 At the same time, your Honor, I think it's ironic to
10:38:50 23 note that it was the defendants who then raised the issue
10:38:54 24 about parsing and whether there had been some waiver due to
10:38:58 25 the lapse of time.

10:38:58 1 THE COURT: Well, I took care of that. Don't worry.

10:39:00 2 MR. MOGIN: But the point being, your Honor, is that
10:39:04 3 I think the defendants are speaking with what is expedient for
10:39:12 4 their position at the moment, and I think that in order to
10:39:14 5 understand why the plaintiffs are so frustrated with the
10:39:16 6 process, if you will, is because of context. And the first
10:39:20 7 thing in context that I want to bring to your attention is
10:39:24 8 something about the time frame here.

10:39:28 9 The first thing about the time frame to recall, your
10:39:30 10 Honor, is that it was August of 2011 and our first status
10:39:36 11 report, joint status report, to Judge Shadur where we
10:39:42 12 identified a number of issues. And this was a joint status
10:39:46 13 report, the defendants signed off on it, and we identified
10:39:50 14 these as common issues that we would try to resolve before
10:39:54 15 turning to the individual issues.

10:39:56 16 And the common issues at that time that were
10:40:00 17 discussed was ESI search methodology, which at the time was
10:40:04 18 phrased as we were asking for subject matter searches, and
10:40:12 19 whereas the defendants were proposing the custodians and
10:40:14 20 Boolean search.

10:40:16 21 Now, at that time, of course, your Honor, we hadn't
10:40:18 22 seen their search terms, and we knew nothing of their actual
10:40:26 23 search methodology as it was going to be applied. In other
10:40:28 24 words, we had none of the information of the type that's in
10:40:32 25 that IP letter that we will talk about in a moment. The only

10:40:36 1 custodians at that point that were under discussion were the
10:40:40 2 custodians that were unilaterally put forward by the
10:40:42 3 defendants in Ms. Miller's letter of August of 2011, the 138
10:40:50 4 there.

10:40:52 5 The other thing that we discussed at that time with
10:40:56 6 Judge Shadur in August was the scope of the search. That is,
10:41:00 7 the sources, backup tapes, non-server media, et cetera, et
10:41:06 8 cetera, and then, most importantly, relevant time period.
10:41:10 9 Now, that's August and that's the joint report.

10:41:14 10 As things were progressing and as we were preparing a
10:41:18 11 joint report -- and by the way, your Honor, we said at that
10:41:22 12 time to Judge Shadur that we thought that motion practice
10:41:24 13 might be required in order to resolve these things.

10:41:28 14 After that, there was a next status conference that
10:41:30 15 was scheduled for November 15th, but the defendants asked us
10:41:34 16 to please take that off the calendar and meet with them, which
10:41:40 17 we did, at which time they began to explain some of the search
10:41:44 18 methodology was the GP testing of protocol that you heard
10:41:48 19 about during the hearings. We weren't satisfied at that
10:41:56 20 point. The defendants at that point also asked rather than do
10:41:58 21 the 30(b)(6) depositions that had been scheduled at that point
10:42:02 22 in time, they could send us letters. And we said, You can
10:42:06 23 send us letters, but, of course, it's without prejudice, and
10:42:08 24 that was quite clear, notwithstanding what transpired
10:42:12 25 thereafter.

10:42:14 1 So what did we tell Judge Shadur in December 15th
10:42:18 2 were the issues? We then said that the issues were, again,
10:42:22 3 the ESI search methodology, we talked about using predictive
10:42:30 4 coding, we talked about random sampling of the documents, we
10:42:36 5 also talked about, again, the scope of searches, what were the
10:42:38 6 sources, and, again, the relevant time periods.

10:42:42 7 We also at that time talked about indexes and
10:42:44 8 organization of the documents. If you go back and you look at
10:42:48 9 the transcript, you will see there is a lengthy colloquy with
10:42:52 10 Judge Shadur about indexes and organization and his feelings
10:42:56 11 about that, which were fairly specific, that he thought the
10:43:02 12 defendants were required to index or to organize.

10:43:06 13 THE COURT: He also said in that same transcript he
10:43:10 14 is not familiar with electronic discovery, and his talking
10:43:14 15 about indexing was in a paper case, Mr. Mogin. I mean, he has
10:43:20 16 more experience than anybody in the building, I couldn't agree
10:43:22 17 with you more, but in that same frame, in that same -- that
10:43:28 18 was the day he decided to send it to me, he said, I don't know
10:43:32 19 nothing about electronic discovery.

10:43:38 20 MR. MOGIN: I respectfully disagree, your Honor. He
10:43:40 21 did that, I thought, in the context of discussing the search
10:43:42 22 methodology and sources. With respect to indexes, I think the
10:43:48 23 review of the transcript will show something different. I
10:43:50 24 respectfully disagree with your interpretation of that.

10:43:54 25 Be that as it may, your Honor, he did then make the

10:43:58 1 referral. The referral was actually somewhat broader than the
10:44:04 2 referral that was referenced in the transcript. And on
10:44:06 3 February the 6th, the plaintiffs, gave you our first
10:44:12 4 submission. And we told you at that point in time that the
10:44:14 5 issues for us were the search method that was CBAA versus
10:44:22 6 Boolean and custodial searches, which is department searches
10:44:24 7 or unit searches. We said that the scope of search -- that
10:44:28 8 is, the sources -- was also important for us. We said again
10:44:32 9 that the time period was important and that indexing and
10:44:36 10 organization was important.

10:44:38 11 The defendants, as you recall, were quite adamant
10:44:42 12 that, oh, no, the hearing only had to do with search
10:44:44 13 methodology, and the papers will bear that out.

10:44:48 14 We then, again, your Honor, if I can refer you to the
10:44:52 15 13th of February, again we talked about collection,
10:44:56 16 preservation, what's going to be the corpus, how are we going
10:45:00 17 to match up corporate functions with sources, with custodians,
10:45:04 18 et cetera. We talked about time period. We talked about
10:45:08 19 organizations. Subsequently, we talked about trade
10:45:12 20 associations. We have talked about all of the many parsing
10:45:16 21 issues. We have talked about the enumerable individual
10:45:20 22 issues. But in point in fact, what isn't yet resolved or,
10:45:26 23 from what I can tell listening to the defendants and reading
10:45:28 24 their submissions, time period, indexing and organization,
10:45:34 25 what's going to be the proper corpus, from what sources.

10:45:40 1 But what has happened is, at your Honor's request,
10:45:44 2 the plaintiffs have, for the time being, suspended their
10:45:48 3 pursuit of a more robust electronic search using more modern
10:45:54 4 tools than the defendants, in fact, used. We have suspended
10:45:58 5 that. And we gave you a proposal, which was never responded
10:46:02 6 to in that respect.

10:46:06 7 So I don't know precisely then what's meant by global
10:46:12 8 resolution in the context that the defendants are talking
10:46:16 9 about because to us, your Honor, it sounds like what the
10:46:22 10 defendants want to do is get to an issue, quote, resolve it,
10:46:26 11 and then close the door. There's no going back, et cetera.

10:46:30 12 THE COURT: That isn't what they said.

10:46:32 13 MR. MOGIN: Well, that's how plaintiffs --

10:46:32 14 THE COURT: That isn't what they said.

10:46:34 15 MR. MOGIN: Respectfully, your Honor, that's how the
10:46:36 16 plaintiffs perceive it.

10:46:38 17 And so where are we? Well, the plaintiffs have an
10:46:46 18 obligation to the class and to our clients.

10:46:52 19 THE COURT: I'm sorry?

10:46:52 20 MR. MOGIN: We have an obligation to the class and
10:46:54 21 our clients, and our obligation, of course, can't be divorced
10:46:58 22 from our burden of proof. We have the burden of proof with
10:47:00 23 respect to not just the case in its totality, but we're
10:47:04 24 obviously going to bear most of the burden of proof on these
10:47:08 25 discovery issues.

10:47:08 1 So the defendants have come forward to you with all
10:47:12 2 sorts of ideas about how the plaintiffs can compromise, how
10:47:16 3 the plaintiffs can back off. Well, I have said repeatedly to
10:47:22 4 the court and to the defendants that we can't negotiate
10:47:28 5 without a willing negotiating partner, and a willing
10:47:30 6 negotiating partner is not one who acts unilaterally. The
10:47:36 7 search methodology, the search terms, that was unilateral.

10:47:40 8 THE COURT: No, that was court imposed. I'm sorry.
10:47:46 9 You can say it was unilateral in the beginning.

10:47:50 10 MR. MOGIN: I am referring to the defendants. What
10:47:52 11 the defendants actually did, your Honor, was not court
10:47:56 12 imposed.

10:47:56 13 THE COURT: Well, it was -- if the chronology, you
10:48:02 14 know -- it began as -- you know, it began as the defendants
10:48:06 15 picked the original search terms. And as I understood it, by
10:48:12 16 September, they asked you for input on search terms.

10:48:16 17 MR. MOGIN: And got it twice and ignored it once.

10:48:18 18 THE COURT: Okay.

10:48:20 19 MR. MOGIN: Completely ignored it once.

10:48:22 20 THE COURT: Okay. But, I mean, I agree with you when
10:48:26 21 they began their process, they picked the original terms
10:48:30 22 because they were the producing party, and then they asked you
10:48:36 23 for input, but I truthfully, if you're telling me they have
10:48:40 24 never listened to you or you've made other suggestions, I am
10:48:44 25 very surprised at that.

10:48:46 1 MR. MOGIN: Well, I can point to it in the record,
10:48:48 2 your Honor. After their search terms came out, we sent them a
10:48:56 3 letter saying, Well, wait a minute, you haven't dealt with
10:49:00 4 these particular issues which are apparent from the face of
10:49:04 5 the RPDs.

10:49:04 6 THE COURT: Well --

10:49:06 7 MR. MOGIN: Excuse me. Let me finish, if you would,
10:49:08 8 please.

10:49:08 9 And then they did some modification of the search
10:49:16 10 term. Now, I want to point out that every time we sent them a
10:49:20 11 letter, we said we are not suggesting that we're agreeing to
10:49:22 12 this methodology.

10:49:24 13 THE COURT: I understand that, and that's my fault,
10:49:26 14 not theirs.

10:49:26 15 MR. MOGIN: And then in November --

10:49:28 16 THE COURT: That is my fault. Okay?

10:49:30 17 MR. MOGIN: And then in November, after we saw the
10:49:32 18 second iteration of their search terms, we sent them yet again
10:49:38 19 another letter, and as the hearings have revealed, none of the
10:49:40 20 suggestions from that letter were incorporated. And what we
10:49:44 21 also learned in the hearings was that the search methodology
10:49:48 22 that was used was not used on all of the requests, we learned
10:49:56 23 that there was no ability to link or the ability had been lost
10:50:00 24 to link search requests -- search terms to particular
10:50:08 25 requests, and, ultimately, it wasn't until a few weeks ago

10:50:12 1 when IP gave us the letter, which, as I said, I commend them
10:50:20 2 for the transparency, but to us -- we gave them an exhibit
10:50:24 3 that we attached to our status conference statement today, to
10:50:28 4 us that just shows in very clear fashion that the requests
10:50:34 5 that we submitted are, in large part, not the requests that
10:50:40 6 the defendants have responded to.

10:50:42 7 So why they would love to come before your Honor and
10:50:46 8 tell you that eight million pages or 10 million pages or this
10:50:50 9 page count or that page count, in point of fact, what we are
10:50:52 10 seeking -- what the plaintiffs are seeking are the documents
10:50:54 11 that we have requested so that we can ultimately meet our
10:50:58 12 burdens of proof.

10:51:02 13 The point being, your Honor, that -- well, let me go
10:51:10 14 on. The defendants have asked that, Why don't you just take
10:51:14 15 all of our documents --

10:51:16 16 THE COURT: Take all your what?

10:51:16 17 MR. MOGIN: Take all of our documents, review the
10:51:20 18 documents, and then we will have a discussion. Now, that's
10:51:22 19 the very first thing that they put on the table, your Honor,
10:51:26 20 when in February, they ignored your order to tweak the Boolean
10:51:34 21 and came forward and said, We are going to produce our
10:51:38 22 documents. That's what they said. The plaintiffs can look at
10:51:40 23 them, and then we will be very open to this and that and the
10:51:44 24 other thing.

10:51:44 25 THE COURT: In certain cases. You shouldn't be this

10:51:46 1 sarcastic.

10:51:48 2 MR. MOGIN: I don't mean to be sarcastic, your Honor.
10:51:50 3 I'm being serious.

10:51:52 4 THE COURT: In certain cases, an early review, if you
10:51:54 5 didn't have seven defendants, okay, an early review might be
10:52:00 6 one method of verification because if nothing else I have
10:52:04 7 learned from this case, and I am going to tell you in a few
10:52:08 8 minutes, is we are on -- you know, maiden territory here
10:52:16 9 legally; not in the e-world. But in the case law on one of
10:52:24 10 the two prongs of what you have been saying since February is,
10:52:34 11 I believe -- well, you finish. You finish, and then I will
10:52:38 12 talk. You finish.

10:52:40 13 I mean, I do hear you, Mr. Mogin. I hear you loud
10:52:42 14 and clear. And you're right, I never made a formal ruling on
10:52:48 15 the search method in this case. That is not their fault.
10:52:52 16 Okay? That is not their fault.

10:52:54 17 MR. MOGIN: I am not suggesting that it was.

10:52:56 18 THE COURT: I told you -- I told you what -- which
10:53:00 19 way I was, quote, unquote, leaning so you know what -- you
10:53:04 20 know how I'm leaning. I made that perfectly clear. But I've
10:53:10 21 never told you in a coherent fashion because what I have been
10:53:18 22 trying to do is you said there are two problems with Boolean
10:53:22 23 search, and all of these things that we have been trying to do
10:53:28 24 since February were to help correct your problems with Boolean
10:53:34 25 search.

10:53:34 1 MR. MOGIN: Your Honor, let me get back to that,
10:53:36 2 please. The point is, yes, you did ask for certain things,
10:53:40 3 but one of the things that you did ask for at the conclusion
10:53:44 4 of the hearing --

10:53:44 5 THE COURT: Was a way to verify.

10:53:46 6 MR. MOGIN: No, it wasn't. You asked us, rather,
10:53:50 7 your Honor, if we could -- verification was included, that you
10:53:54 8 asked if there was a way to tweak, as you put it, the Boolean
10:54:00 9 methodology, quote, Can you get together with your experts,
10:54:02 10 with Dr. Lewis and Mr. Regard, and tweak this so that you can
10:54:06 11 use the Boolean construct. I believe that's close to a
10:54:10 12 verbatim quote, your Honor. And we did that, but the
10:54:14 13 defendants never did.

10:54:16 14 What the defendants came forward with is, their
10:54:18 15 proposal, We're going to produce all the documents that were
10:54:22 16 the result of our unverified search methodology, and the
10:54:26 17 plaintiffs can go through them, and if they have things that
10:54:30 18 they think should be added, we will be very open to adding
10:54:34 19 them.

10:54:36 20 Now, I'm not being sarcastic, your Honor, but one of
10:54:44 21 the things, one example of being very open to having them, was
10:54:46 22 Mr. Hannan, and yet we had to go through and get an order and
10:54:50 23 basically spent half a day in mediation. I don't really
10:54:52 24 consider that to be, quote, very open. That's just an indicia
10:54:58 25 of what the process will be if we continue down this road.

10:55:00 1 So --

10:55:02 2 THE COURT: All right.

10:55:02 3 MR. MOGIN: -- what's my point to all this, your
10:55:04 4 Honor? My point to all this is that the plaintiffs have put
10:55:12 5 on the table for a long time a number of issues, and it seems
10:55:14 6 like the issues have not been addressed in recent hearings.
10:55:20 7 Parsing is one issue that has to be addressed, and we're
10:55:24 8 ready, willing, and able to do that. We will do it in the
10:55:28 9 most efficient way. I continue to believe that IP-type
10:55:32 10 letters from the other defendants that are as candid as IP was
10:55:38 11 and as transparent as IP was will certainly assist the court
10:55:42 12 with respect to that aspect of the case. But the time period
10:55:46 13 has to be resolved. Indexing and organization needs to be
10:55:52 14 resolved.

10:55:54 15 THE COURT: So you're actually -- okay. Now, let me
10:56:00 16 take a deep breath here. This is exactly what I mean. You
10:56:06 17 guys take a deep breath, okay, because Mr. Mogin I think is
10:56:10 18 just saying he is willing to do McKeown kind of letters with
10:56:20 19 each of you. I would think if you were up at the podium, you
10:56:24 20 would say, Okay, most of you have said, I'll do McKeown kind
10:56:28 21 of letters if you are going to drop phase one requests to
10:56:34 22 produce. Whether it's me, Judge Martin, or Judge Rowland,
10:56:38 23 whoever the heck it is, or Judge Shadur, whatever the heck
10:56:42 24 Judge Shadur does, they have said they will do McKeown letters
10:56:48 25 -- all I'm trying to do, Mr. Mogin, here today is to get

10:56:52 1 better communication here. They're saying they're going to do
10:56:56 2 it if you say affirmatively on the spot that as far as round
10:57:00 3 one goes of the requests to produce, Nolan, you don't have to
10:57:04 4 write an opinion on this, we will do McKeown's letters. But
10:57:10 5 they need you to say that's the end.

10:57:12 6 MR. MOGIN: You mean once I have those letters, I
10:57:16 7 can't move to compel?

10:57:16 8 THE COURT: You cannot go back and do a full-fledged
10:57:22 9 briefing of the 92 if they go through all the work and they do
10:57:24 10 what Jim did -- what I understand they mean, they have got to
10:57:36 11 have closure on -- not that you can't come back and say, Hey,
10:57:42 12 I need more information on da, da, da, da, da, but that's one
10:57:48 13 issue on round one request to produce is finished.

10:57:52 14 MR. MOGIN: Does that mean that I cannot move to
10:57:54 15 compel based upon the deficiencies that are exposed by those
10:57:58 16 letters?

10:58:00 17 THE COURT: All right. Answer. What does that mean?

10:58:00 18 MR. NEUWIRTH: And I think --

10:58:06 19 THE COURT: What does that mean? Just answer that
10:58:08 20 question. Can he move to compel -- well, wait. You know
10:58:12 21 what? Let's ask Mr. McKeown, because he's done it.

10:58:22 22 MR. McKEOWN: Your Honor, I can only speak for
10:58:24 23 International Paper, not for any of the other defendants.

10:58:26 24 THE COURT: All right.

10:58:26 25 MR. McKEOWN: From our perspective, the intention of

10:58:30 1 the letter was to crystallize any issue, try to satisfy the
10:58:32 2 plaintiffs --

10:58:34 3 THE COURT: Hang on. Are you guys listening to what
10:58:38 4 Mr. McKeown is saying? He is telling you what his intention
10:58:40 5 was.

10:58:42 6 MR. McKEOWN: We wanted to crystallize the issues, we
10:58:44 7 wanted to identify when you look across the categories defined
10:58:48 8 by the plaintiffs the broad spectrum of documents that were
10:58:52 9 being produced so that we could then identify if there were
10:58:54 10 specific issues that Mr. Mogin and I would have to discuss
10:58:56 11 further. We wanted to very much narrow those issues, and we
10:59:00 12 wanted this to move it from talking about 92 requests to
10:59:04 13 perhaps we are going to talk about five or six requests that
10:59:08 14 we are going to have to fight about.

10:59:10 15 THE COURT: And then you would go back or if he
10:59:12 16 needed to move to compel five or six, you are not going to
10:59:16 17 say, Hey, this was a quid pro quo.

10:59:18 18 MR. McKEOWN: No, we are not.

10:59:20 19 THE COURT: You are not going to go back to 92
10:59:22 20 requests, so how does that -- how does that strike you?

10:59:26 21 MR. MOGIN: Well, in point of fact, your Honor, 92
10:59:28 22 requests is the universe of the requests, 30 or 35 of which
10:59:32 23 were transactional. Only 60 -- 55 or 60 had to do with
10:59:36 24 conduct.

10:59:40 25 Yes, of course I am not going to go back on the

10:59:42 1 totality of those 50 or 60, but I think that it's -- I would
10:59:46 2 love it if we could narrow it to four or five.

10:59:48 3 THE COURT: Right.

10:59:48 4 MR. MOGIN: But I don't know that that's going to
10:59:50 5 happen in light of the breadth of the --

10:59:56 6 THE COURT: Request.

10:59:56 7 MR. MOGIN: No, in light of the breadth of the
11:00:00 8 elimination, in our view, and I think we demonstrated this to
11:00:04 9 you at a past status conference statement, arbitrary
11:00:08 10 elimination of categories of documents without any linkage to
11:00:12 11 the actual objections that supposedly justified them.

11:00:20 12 So I do think, and as I have said before, I think
11:00:22 13 that the transparency is helpful to us, it's helpful to the
11:00:26 14 court, it may be helpful in resolving the issues. But I
11:00:30 15 cannot say, as I stand here today, that it means that I will
11:00:34 16 limit my motion to compel to five requests --

11:00:40 17 THE COURT: Right. I wouldn't ask you to do that.
11:00:44 18 Okay?

11:00:44 19 MR. MOGIN: As you read, however, the status
11:00:46 20 conference statements, some of the other defendants have said,
11:00:48 21 Okay, we will give you the letters, but that's it. And as we
11:00:52 22 perceive it, that means another closing of the door that can't
11:00:56 23 be reopened.

11:00:56 24 THE COURT: All right. Okay. Okay. So now we have
11:01:00 25 -- okay. This could be a little bit of our caucus here. All

11:01:06 1 right.

11:01:06 2 See, I actually thought -- Mr. Mogin, I actually
11:01:10 3 thought the other part -- I mean, I thought we were heading
11:01:12 4 towards briefing on the requests to produce. I mean, that's
11:01:20 5 sort of where -- when I came out on the bench today, I thought
11:01:26 6 that was it; I thought that was more loggerheads on the
11:01:28 7 requests to produce than this other stuff that we have been,
11:01:32 8 you know, working on. So this is very enlightening to me. I
11:01:40 9 didn't know that there was hope for that.

11:01:42 10 Now, whether or not -- everybody is just so sick of
11:01:46 11 this process because what is the elephant in the middle of the
11:01:50 12 room is that if somebody were going to write the story,
11:01:54 13 cooperation is very hard. Actually, in some ways, it's easier
11:02:04 14 to do it the old-fashioned way. I think, very bluntly, there
11:02:08 15 is a level of, you know, kind of frustration here too.

11:02:10 16 MR. MOGIN: I think I would say it differently, your
11:02:12 17 Honor. I think if there had been more cooperation up front,
11:02:16 18 then we wouldn't find ourselves in this situation where now --

11:02:18 19 THE COURT: I don't know how you say that --

11:02:20 20 MR. MOGIN: -- we're having to use the old tools.

11:02:22 21 THE COURT: Well, I don't know how you say that. I
11:02:22 22 mean, even if we sort of failed at it, I thought everybody
11:02:26 23 tried really hard.

11:02:28 24 MR. MOGIN: I'm referring to the period of time
11:02:30 25 before your Honor was involved.

11:02:32 1 THE COURT: Well, I don't -- you know. So anyway --

11:02:38 2 MR. MOGIN: And now let's talk about litigation holds
11:02:40 3 for a minute.

11:02:40 4 THE COURT: No, I want to talk about search for a
11:02:44 5 minute because I want to tell you what I think about the
11:02:48 6 search. Okay?

11:02:50 7 So I received the case, and it was being written
11:03:02 8 about all over the country. The judge in Chicago is going to
11:03:04 9 decide, is predictive coding, computer assisted, whatever you
11:03:10 10 want to call it, a preferable method of search than Boolean
11:03:20 11 search. I mean, that's what the outsiders were saying about
11:03:22 12 it. And what we had, what I was presented with, because it
11:03:28 13 wasn't a law school test, or it wasn't an article on a blog,
11:03:34 14 it was real-life situation where the defendants had been in
11:03:40 15 the case for one year prior, they had been working on motions
11:03:46 16 to dismiss, the producing parties among themselves, among
11:03:54 17 seven of them, this is the other thing that's different than
11:03:56 18 other cases, there were seven defendants, seven separate ESI
11:04:02 19 systems, and they made an agreement themselves that they were
11:04:06 20 going to use a Boolean method. They hired their tech people,
11:04:14 21 they hired their computer people, and it sounds like, for me,
11:04:20 22 Mr. Mogin, from the early letters, they did not consult with
11:04:22 23 you on the method, nor is there any requirement that they
11:04:28 24 consult you on the method.

11:04:30 25 MR. MOGIN: And to the extent that we were consulted,

11:04:32 1 your Honor, at that time, we were using a different
11:04:34 2 phraseology, but we asked that they use, A, advanced
11:04:40 3 analytics, and, B, that they provide us with random samples so
11:04:44 4 that we could narrow the discovery process.

11:04:48 5 THE COURT: Right. And as I have said several times
11:04:50 6 before, Judge Shadur ruled -- the final ruling on the motion
11:04:56 7 to dismiss was April, and I believe, according to the letters,
11:05:00 8 in approximately September, probably sooner over the summer,
11:05:06 9 but there was certainly communication, particularly with
11:05:10 10 Ms. Miller, there was, you know, communication. But I think
11:05:12 11 the real tell us what search terms you'd like, there was
11:05:18 12 really an invitation to you to start search terms.

11:05:20 13 MR. MOGIN: Let me correct that, your Honor. In
11:05:24 14 point of fact, there was a meet and confer that I believe took
11:05:28 15 place in May of 2011, and I believe it was either shortly
11:05:36 16 before or shortly after the RPDs had actually issued, but it
11:05:42 17 was after the motion to dismiss, and it was after Judge Shadur
11:05:44 18 had denied the motion to stay discovery pending the motion to
11:05:48 19 dismiss. And we at that time were talking about our concerns
11:05:56 20 about the use of a Boolean technology. And the defendants
11:06:02 21 said, Well, we will search -- we will develop search terms and
11:06:06 22 send them to you, and we will get them to you in about a
11:06:12 23 month, June, mid June. And that was tied with some other
11:06:14 24 things, including exemplars. It wasn't random samples at that
11:06:24 25 point. It was simply asking for some exemplars and some other

11:06:26 1 things. It wasn't in June that we got them. It was after
11:06:28 2 several inquiries they finally showed up without any input
11:06:32 3 from us, without seeing samples, in August.

11:06:36 4 Had we gotten right on it, what that meant is that
11:06:42 5 this is efficient based on the face of the RPDs. You have a
11:06:44 6 number of search terms that don't even attempt to reach the
11:06:48 7 defined terms or many of the RPDs. Again, that was with our
11:06:54 8 full reservation of thought.

11:06:58 9 So I think it's important, your Honor, that you
11:07:00 10 understand how early and how often we have said this to the
11:07:04 11 defendants, so it's not a situation of cooperation breaking
11:07:10 12 down or not starting or us not attempting to influence the
11:07:14 13 process until August. That simply is not true. And, in fact,
11:07:20 14 even before the motions to dismiss were heard, in December of
11:07:24 15 2010, Mr. Neuwirth and I had a loud discussion in the hallway
11:07:32 16 outside of Judge Shadur's courtroom --

11:07:34 17 THE COURT: I believe that.

11:07:36 18 MR. MOGIN: -- where we said --

11:07:38 19 THE COURT: I believe that.

11:07:38 20 MR. MOGIN: -- where we said flat out --

11:07:40 21 THE COURT: You said you had a loud discussion.

11:07:48 22 MR. MOGIN: Well, I heard a loud voice. That's true.

11:07:50 23 THE COURT: It's okay, Mr. Mogin. Come on.

11:07:56 24 MR. FREED: May I add something, your Honor, to the
11:07:58 25 discussion?

11:07:58 1 THE COURT: Yes.

11:08:04 2 MR. FREED: Thank you.

11:08:04 3 From my perspective, your Honor, which maybe is a
11:08:06 4 little bit different than what you've heard today. To a very
11:08:08 5 great extent, we are arguing about something where I think the
11:08:10 6 ship has sailed.

11:08:12 7 THE COURT: Yes.

11:08:12 8 MR. FREED: Defendants have done what they did, and
11:08:14 9 we were -- and I'm going to try in every way to say I'm not
11:08:18 10 trying to find fault in any of my comments; I am trying to put
11:08:20 11 my comments in perspective -- we were not able to change their
11:08:24 12 mind about what they should do.

11:08:26 13 THE COURT: Or mine.

11:08:28 14 MR. FREED: Or yours.

11:08:30 15 So now we're here where there is a very large corpus
11:08:32 16 of documents, seven or eight million pages, we're told, and
11:08:38 17 they are not willing to modify the way they approached their
11:08:44 18 search, and they have said to us, Look at what we have offered
11:08:48 19 you and then come back to us. And they have said that this
11:08:54 20 will create certain efficiencies because now you will know
11:08:58 21 when you have reviewed all these documents what problems you
11:09:00 22 may realize, and then we will be more effective and productive
11:09:04 23 if you do that.

11:09:06 24 So I would say we're really dealing in parallel
11:09:12 25 universes. That's one universe.

11:09:12 1 There is another universe out there, however, which
11:09:16 2 has been deferred and for the first time is obliquely
11:09:24 3 mentioned by Mr. Feller. We have issue of time frame. For
11:09:26 4 the first time, I heard Mr. Feller obliquely state maybe he
11:09:28 5 would introduce time frame into these global resolutions. We
11:09:34 6 have the issue of sources. We have the issue of whether or
11:09:36 7 not they are going to search at the national or regional sales
11:09:38 8 manager level, are they going to search at the plant manager
11:09:42 9 level, how are we going to deal with the parsing. They have
11:09:44 10 offered certain lit hold information but, in certain
11:09:52 11 instances, conditioned it on us waiving the argument that they
11:09:56 12 didn't distribute their lit hold notices sufficiently broadly.
11:10:00 13 Why we should waive that in order to get the identity of
11:10:04 14 people who -- to whom they sent their lit hold on, I don't
11:10:06 15 understand. And the other conditions on custodians.

11:10:10 16 None of that is going to be advanced. Not one of the
11:10:12 17 items I just mentioned is going to be advanced by us looking
11:10:16 18 at their documents because at the end of the day, this is not
11:10:20 19 to be argumentative. These are our issues, and we are going
11:10:22 20 to raise them again.

11:10:24 21 THE COURT: I think that's true.

11:10:26 22 MR. FREED: So why don't we just brief those issues
11:10:30 23 and get that decision so that when we get to the point where
11:10:34 24 we have looked at their corpus of documents, we can know at
11:10:38 25 that point when we raise our other issues what it is that, if

11:10:42 1 anything, they have to do in addition to what they have done?

11:10:44 2 We are not going to reach agreement, I don't believe.

11:10:48 3 I hope I am wrong, but I think it's pretty clear after all the

11:10:50 4 sessions, we are not going to agree on time frames except for

11:10:54 5 some tradeoff which we are not going to accept to --

11:10:56 6 THE COURT: Well, that's the first time anybody has

11:10:58 7 said it in a clear way.

11:11:00 8 MR. FREED: But I think it's true. I'm just sitting

11:11:02 9 here listening to the whole thing not so much as a plaintiff's

11:11:06 10 lawyer but trying to observe the dynamics of what's going on

11:11:08 11 here.

11:11:08 12 We are not going to agree to sources, I don't

11:11:10 13 believe, except for some tradeoff, which we are not going to

11:11:12 14 accept. They have never indicated any willingness to discuss

11:11:16 15 production for national regional sales managers except on a

11:11:20 16 sample basis, but we gave you 23 cases where we have

11:11:22 17 demonstrated in actual case decisions where that's relevant to

11:11:28 18 the determination of a conspiracy.

11:11:32 19 So I'm saying, okay, you win because time has worked

11:11:36 20 to your benefit. We will look at your documents. We will

11:11:42 21 come back at whatever period of time it takes us to go through

11:11:44 22 those documents, and we will tell you what it is in those

11:11:48 23 documents that we think leads us to believe that there is an

11:11:50 24 insufficiency of the way you utilized your search terms and

11:11:54 25 the way you approached your search. But why not just get it

11:11:58 1 done? These other what I call the parallel universe, these
11:12:02 2 discrete issues where there's not going to be any movement or
11:12:06 3 resolution because we are not going to trade off in any
11:12:08 4 meaningful way --

11:12:10 5 THE COURT: Now, wait. I mean, as somebody who has
11:12:14 6 sat here for 14 years, I have done thousands of discovery
11:12:20 7 disputes. People trade off all the time.

11:12:22 8 MR. FREED: They do, your Honor.

11:12:22 9 THE COURT: Whether they call it -- you know, there's
11:12:26 10 something kind of, you know, grungy about the term "tradeoff,"
11:12:32 11 but that's what -- you know, now we call it cooperation, but,
11:12:36 12 you know, truthfully, what people have been doing for a long,
11:12:40 13 long time is you're making a deal because if you had to fight
11:12:42 14 out every single issue, you would be charging your client ten
11:12:50 15 times the amount of money, it would take so much longer to do
11:12:54 16 it, so, I mean --

11:12:56 17 MR. FREED: We can -- I'm sorry. I didn't mean to
11:13:00 18 speak over you.

11:13:00 19 THE COURT: I mean, why I said I thought it would be
11:13:04 20 a good idea is -- you know, I am not arguing with you. I
11:13:08 21 think it is time to brief some issues. What I was -- it was a
11:13:14 22 Hail Mary pass here. Are there some things that we could
11:13:18 23 resolve, trade off, not have to brief?

11:13:22 24 MR. FREED: I think on very discrete levels, yes.
11:13:24 25 For example, I picked an issue that Mr. Feller raised, which

11:13:28 1 is we will give you the lit hold -- identity of the people who
11:13:30 2 got the lit hold, but only if you waive as a condition that
11:13:36 3 you will not seek to argue that his client didn't sufficiently
11:13:44 4 send out the lit hold notice to a number of people. Maybe we
11:13:48 5 can resolve that. I think he's wrong. I would hope you would
11:13:50 6 see that he is wrong and we can resolve that. If not, maybe
11:13:52 7 we can't resolve that.

11:13:54 8 But some of these other fundamental issues, you can't
11:13:58 9 -- and I say this respectfully. If we believe that for
11:14:00 10 purposes of class certification and conspiracy proof, we have
11:14:04 11 to have data from a certain time period. It's not being
11:14:10 12 argumentative or obstreperous for us to say we can't trade
11:14:16 13 that off against a resolution of the search term issue along
11:14:20 14 the lines that Mr. Mogin has been exploring with Mr. McKeown.
11:14:24 15 It isn't that we won't try to resolve issues, but that's not a
11:14:28 16 tradeoff.

11:14:28 17 THE COURT: Okay. Well, then that's good to know. I
11:14:32 18 mean, that's what I was trying to say --

11:14:34 19 MR. FREED: And I am trying to crystallize it in that
11:14:38 20 respect.

11:14:38 21 THE COURT: Right

11:14:38 22 MR. FREED: I think, in all candor, that the issues
11:14:42 23 that I've identified, and I will be happy to enumerate them,
11:14:46 24 aren't issues we could trade off on a wholesale basis for -- I
11:14:48 25 would hope that we could continue to go forward with

11:14:50 1 Mr. McKeown and the other defendants on the kind of disclosure
11:14:56 2 which Mr. McKeown has made that Mr. Mogin has said several
11:15:00 3 times has been transparent and helpful but not necessarily
11:15:02 4 from our perspective dispositive. I wouldn't try to shut that
11:15:06 5 down at all. But if there are these five, six, seven issues
11:15:10 6 which I don't think are going to get resolved through the kind
11:15:14 7 of cooperation that you're talking about, won't it advance
11:15:22 8 things just to see are we right or are they right on these
11:15:26 9 issues? It's not because we are so anxious to --

11:15:28 10 THE COURT: Here. We are going to do -- we are going
11:15:30 11 to have a little caucus in a minute because I want everybody's
11:15:36 12 blood pressure to go down, and -- but I want to say -- I
11:15:40 13 didn't get to say what I had about search.

11:15:44 14 MR. FREED: Can I sit down, your Honor?

11:15:46 15 THE COURT: Yes.

11:15:46 16 MR. MOGIN: Your Honor, before you do so, if I might,
11:15:50 17 please, please. Just a moment ago, you made a comment in
11:15:54 18 response to something that Mr. Freed said. We have,
11:15:56 19 plaintiffs, had failed to persuade you with respect to search
11:16:00 20 methodology. Well, your Honor, I think it would be unfair for
11:16:04 21 you to make further statements like that, quite frankly, in
11:16:10 22 light of the fact that the hearing remains open. The evidence
11:16:12 23 is not --

11:16:12 24 THE COURT: I am not going to tell --

11:16:14 25 MR. MOGIN: Our evidence is not in, and you also

11:16:16 1 promised us that there would be post-hearing briefing, which
11:16:20 2 obviously hasn't happened.

11:16:28 3 THE COURT: All right. One thing I do want to put
11:16:32 4 into context, to use your word, Mr. Mogin. Let's put this in
11:16:36 5 context.

11:16:36 6 When we ended the hearing at my request, okay, two
11:16:44 7 things were clear to me about your problems with Boolean
11:16:54 8 search. One was the scope of the Boolean search is what I
11:16:58 9 would call was it took the form of -- because a Boolean search
11:17:04 10 is primarily based on custodians, and you felt that not just
11:17:10 11 because the defendants had chosen Boolean search, but the way
11:17:16 12 they perceived the case, that you were having a problem with
11:17:22 13 too narrow of a custodian base. Okay? And I heard you loud
11:17:28 14 and clear. That's what you were saying at the time.

11:17:30 15 The second problem that you interpreted while you
11:17:34 16 were arguing that a computer assisted was a better method was
11:17:40 17 that it was either easier to verify or more accurately
11:17:48 18 verifiable that the search was hitting the responsive
11:17:50 19 documents. So one went to the scope, and I would call the
11:17:54 20 second problem, for want of another word, verification.

11:18:00 21 So in my mind, which I have not said until today,
11:18:06 22 because I had never had to deal with this, and trying to be
11:18:14 23 fair to both sides, I am the one that suggested most of the
11:18:18 24 methods to how to broaden the scope, and I have identified six
11:18:26 25 ways in which the defendants have broadened the scope. So a

11:18:36 1 lot of the time that maybe now we look back in hindsight and
11:18:42 2 say we wasted or didn't work was trying to address your issue
11:18:46 3 last February of two problems with Boolean search. So the
11:18:54 4 first way that they did it is they voluntarily gave you,
11:19:04 5 quote, unquote, more custodians. Were they right, were they
11:19:06 6 wrong, I don't know, but it was voluntary.

11:19:08 7 The second way was this kind of cockamamie notion I
11:19:14 8 had, well, whoever decided to do the litigation hold, they
11:19:20 9 must be important people, so let's give all the names of the
11:19:24 10 litigation holds, because I want some context here. It isn't
11:19:28 11 like we were just off on some lark here. I was trying to
11:19:32 12 address your concern that the custodian base wasn't broad
11:19:38 13 enough. I wasn't either agreeing with you, I wasn't agreeing
11:19:42 14 with them. I heard a fairness issue, and I said, Okay, so
11:19:46 15 let's try that. Okay? We will do litigation hold. Names on
11:19:54 16 litigation hold.

11:19:54 17 And then, because I hadn't thought it out, what the
11:19:58 18 consequences could mean, we did kind of, you know, I guess
11:20:02 19 we'd call them orders to try to say, Well, that doesn't mean
11:20:08 20 full discovery of the names. Okay.

11:20:12 21 Then the next thing we did was then we got into the
11:20:22 22 other thing you told us about, predictive coding, which I had
11:20:26 23 never heard of before, is that you could do departmental
11:20:30 24 searches. I don't know really what that truly means.

11:20:36 25 So then in order to broaden the Boolean search, the

11:20:42 1 plaintiffs have, and particularly Mr. McKeown, has been trying
11:20:48 2 to come up with some sampling ideas of other departments other
11:20:54 3 than the executive. So there was an expansion of departments.
11:21:02 4 It may not be exactly what you wanted, but there was
11:21:08 5 expansion.

11:21:10 6 Then organizational charts. I thought organizational
11:21:38 7 charts was going to expand the base.

11:21:42 8 All right. So that was under scope. Okay? I agree
11:21:48 9 with you we have not come up, although we have been floating
11:21:54 10 around three or four ways to -- even though no case has ever
11:22:04 11 required it, verification, a method of verification, because,
11:22:10 12 as I said to you before, I thought the more interesting issue
11:22:14 13 that's come out of this hearing is regardless of the method,
11:22:18 14 it probably is -- as Judge Grimm and Judge Facciola have said,
11:22:24 15 it's important to know it's accurate, but I thought that was
11:22:28 16 an ongoing process is what I thought.

11:22:32 17 So I just want this record -- so we don't look like
11:22:36 18 we're some dysfunctional group down here that is just trying
11:22:40 19 all these ideas willy-nilly, they were a response to your -- I
11:22:48 20 took you very seriously that you had some problems with
11:22:54 21 Boolean search. Okay? Now, your issue that you want to go
11:22:56 22 back to the hearing, this is the first time you have said
11:23:00 23 that, I mean clearly to me today, that you want to go back to
11:23:04 24 the hearing and the second -- and the issue on the briefs.
11:23:10 25 And, I mean, I guess I am now confronted with that directly.

11:23:16 1 So I am not going to rule on search at the moment. I
11:23:20 2 am telling you what my context was and what I thought the last
11:23:26 3 six months of our work was about.

11:23:28 4 MR. MOGIN: That isn't what I was saying, your Honor.

11:23:30 5 THE COURT: And I purposely have not said to you,
11:23:32 6 Withdraw your motion, because you have to do as a plaintiffs'
11:23:38 7 lawyer whatever you need to do to protect your record. I am
11:23:42 8 not trying to put you in that place where I am saying to you,
11:23:50 9 Dan, give up your issue.

11:23:52 10 MR. MOGIN: I understand that, your Honor. And what
11:23:54 11 I was talking about, resumption of the hearing, as you recall
11:23:58 12 from the proposed order that came in at 3:00 o'clock
11:24:02 13 yesterday, Mr. Feller, he asked for particularized findings.
11:24:08 14 I understand you are not going to make them.

11:24:10 15 And then you said a little earlier that you wanted to
11:24:12 16 have some statements about search methodology.

11:24:16 17 All I was saying is that the plaintiffs, okay,
11:24:20 18 through this process, in the interest of cooperation, in the
11:24:24 19 interest of trying to get something done, it's important that
11:24:28 20 everybody understand what we believe to be the huge
11:24:32 21 compromise, huge compromise, unmet at this point, that the
11:24:36 22 plaintiffs have made in suspending for as long as we have
11:24:40 23 those hearings because, your Honor, we believe quite firmly
11:24:46 24 that if those hearings do resume, what we will show you is
11:24:50 25 that the basis for your request for suspension, which was

11:24:56 1 Sedona principle number 6, doesn't or shouldn't apply in this
11:25:00 2 case.

11:25:02 3 So that's all I was trying to say, your Honor, with
11:25:06 4 respect to those hearings, although if there are going to be
11:25:12 5 findings made with respect to search methodology, then
11:25:18 6 obviously we want the hearings to resume. If the defendants
11:25:22 7 can accept this compromise and we start to see some serious
11:25:24 8 movement on their part or more serious movement than we have
11:25:26 9 seen to this point and we get to a resolution of these issues,
11:25:30 10 then we will accept that.

11:25:30 11 THE COURT: Mr. McKeown?

11:25:36 12 MR. McKEOWN: Your Honor, if I may. There are a
11:25:38 13 couple things I'd like to respond to, in part to Mr. Mogin, in
11:25:42 14 part to Mr. Freed.

11:25:44 15 I think there has been a lot more done by the
11:25:46 16 defendants than has been recognized or appreciated by the
11:25:52 17 plaintiffs. For example, there was a comment by Mr. Freed
11:25:58 18 that we haven't given sales managers, national and regional
11:26:04 19 sales managers. If I could pass these up.

11:26:08 20 THE COURT: Thank you.

11:26:12 21 MR. McKEOWN: This is the attachment to Ms. Miller's
11:26:18 22 letter from August 11 of 2011 when the custodians were first
11:26:22 23 disclosed, and what we have done is we have highlighted on
11:26:26 24 this the various individuals here who were in the sales
11:26:30 25 function. So you can see that Mr. Andraneia (phonetic) was the

11:26:34 1 vice president and general manager of commercial and national
11:26:38 2 accounts, and there is a description that talks about him in
11:26:40 3 national sales. Rebecca DuPuey (phonetic) was the pricing
11:26:44 4 manager. Kathy Halligan (phonetic) was the domestic sales
11:26:48 5 manager. We go on to the next page, at the top of the next
11:26:50 6 page, we have two area VPs and general managers in sales.

11:26:54 7 So a lot of these types of documents and these types
11:26:56 8 of custodians are included, and it is a broader search and a
11:27:02 9 broader collection of documents than what has been perceived
11:27:06 10 as just this custodian approach. We have not only done the
11:27:08 11 emails and the My Docs and the hard docs from the various
11:27:12 12 custodians that we have listed, and we are now up to 49
11:27:16 13 people, but we ran scripts on the computers to see what shared
11:27:20 14 drives these folks had access to, what SharePoints they had,
11:27:24 15 and then we looked in there amongst those SharePoints and
11:27:28 16 shared drives in terms of which of those might potentially
11:27:32 17 have responsive documents, and we looked at them even if the
11:27:34 18 documents that were being pulled from there were not created
11:27:38 19 by these custodians.

11:27:38 20 So there are the equivalent of departmental files.
11:27:42 21 We have looked at finance drive, we looked at the Auburn
11:27:44 22 server. A lot of this is laid out in our 30(b)(6) letter.
11:27:48 23 There was discussion about how the defendants wanted to put
11:27:50 24 off the 30(b)(6) depositions. That's true. We wanted to
11:27:54 25 satisfy as much as we could by letters, and you've seen the

11:27:56 1 letters we did, but we also put up witnesses for that.

11:28:00 2 And since the hearing, I think we have continued
11:28:04 3 consistent with how we have perceived the urging of the court
11:28:08 4 to try to move this forward and cooperate. And, you know,
11:28:12 5 along the things we have done is at one point, we gave in
11:28:14 6 early May for our various search strings that IP used how many
11:28:20 7 documents were hit by each search string.

11:28:22 8 THE COURT: Right.

11:28:24 9 MR. McKEOWN: We have given, as you know, the lit
11:28:26 10 hold list with the custodians; we have also given more org
11:28:30 11 charts, including a listing of the various plant managers; we
11:28:34 12 have given more on the sources of the documents folks have
11:28:36 13 had; and, of course, you have seen the letter from June 18th.
11:28:40 14 We are trying to narrow the issues. There are some issues
11:28:42 15 that Mr. Freed may be correct, we just need to brief.

11:28:46 16 THE COURT: Right.

11:28:48 17 MR. McKEOWN: If their position on parsing is we have
11:28:50 18 to go back and re-review all the documents that we have
11:28:54 19 already reviewed with contract attorneys, then we may as well
11:28:56 20 just brief that, but we would like to get it to a spot where
11:28:58 21 we have discrete issues that need to be teed up. And I just
11:29:04 22 didn't want to leave the impression that we haven't included
11:29:06 23 sales folks and we haven't included a lot of files that would
11:29:10 24 be departmental files.

11:29:12 25 MR. FREED: Just briefly in response. I am not going

11:29:14 1 to dispute anything which Mr. McKeown said, although I can't
11:29:18 2 recall whether the documents were produced for the people
11:29:20 3 identified. If he says they were, I won't dispute that.

11:29:24 4 In talking about defendants' positions, in a sense,
11:29:28 5 to make it coherent, you have to speak globally. So last time
11:29:34 6 we were here, Mr. McCareins was arguing strongly that the
11:29:36 7 plant manager level is not appropriate. He was in the line of
11:29:40 8 work case which we were in, and I was one of the leads for the
11:29:42 9 sub class, but the plant manager's discovery did take place.

11:29:48 10 And then Mr. Marovitz argued about, Well, we have
11:29:52 11 salespeople listed, your Honor, but they are at the executive
11:29:56 12 level, so we made the effort to show, well, we need it at a
11:29:58 13 lower level, we need it at the national and regional.

11:30:02 14 So, yeah, there may be exceptions to what I'm saying
11:30:04 15 on a global basis, but all defendants, trust me, have not
11:30:10 16 taken the same position on all issues. There are certain
11:30:14 17 issues which, to the best of my knowledge, they have all taken
11:30:16 18 the same position, and that is time and scope, although maybe
11:30:20 19 scope there's been some give. But to get this resolved among
11:30:28 20 all the defendants, I think it's got to be briefed because
11:30:32 21 they're digging in either collectively or individually in
11:30:36 22 areas where if we get what Mr. McKeown says we're getting,
11:30:40 23 it's fine, but if we're not getting it from Temple or RockTenn
11:30:46 24 or PCA, it still doesn't resolve the problem.

11:30:48 25 THE COURT: You keep going back to the requests to

11:30:50 1 produce, and I think I said at 10:05, you know, we will put it
11:30:54 2 off because, I mean, I am trying to read what's actually being
11:30:58 3 said and what's not being said, sort of the direct and the
11:31:02 4 indirect. It seems like that's the hardest issue.

11:31:04 5 MR. FREED: Yes.

11:31:06 6 THE COURT: So I couldn't agree with you more. I
11:31:08 7 mean, I think we -- I only diverted from what Mr. Mogin said
11:31:12 8 because it sounded like he was opening the door again that he
11:31:16 9 was saying, Well, if they would all do what Mr. McKeown did,
11:31:20 10 so I wanted to pursue it while you're here.

11:31:22 11 MR. FREED: And that's fine, and I am -- look, if we
11:31:24 12 come away today with nothing more, and I hope we can do more,
11:31:28 13 with the understanding of, okay, this is what needs to be
11:31:32 14 briefed and this is what we hope you will continue to try to
11:31:34 15 reach resolution on, I think that's constructive. I mean, I
11:31:38 16 don't consider that a defeat.

11:31:38 17 THE COURT: I agree.

11:31:38 18 MR. FREED: If we reach a point where it is obvious
11:31:42 19 that there's issues which either for some or all of the
11:31:46 20 defendants cannot be resolved, if we say, fine, we now
11:31:48 21 understand after all these good-faith efforts that this is it.

11:31:52 22 So I want to make -- there may be instances where I
11:31:56 23 will say something or Mr. Mogin will say something on a more
11:32:00 24 global basis and one defendant will stand up and say, Yes, but
11:32:02 25 we've done this, but we're talking about them as a group

11:32:04 1 because we're dealing with them as a group.

11:32:08 2 THE COURT: Right. And you have a different approach
11:32:10 3 than Mr. Mogin has.

11:32:10 4 MR. FREED: We do.

11:32:12 5 THE COURT: You do. You do. So that also is like a
11:32:16 6 factor here.

11:32:18 7 Yes. Since we began with you, do you have a
11:32:20 8 brainstorm here to help us out?

11:32:36 9 MR. FELLER: Your Honor, I have two discrete issues
11:32:40 10 that I just need to bring up so the record is clear, and if I
11:32:42 11 may hand up to the court.

11:32:44 12 Your Honor, the Linerboard case has come up --

11:32:48 13 THE COURT: Is this the ZageI case? No.

11:32:50 14 MR. FELLER: No, your Honor. This is, in some
11:32:52 15 respects, the prior version of this litigation involving a
11:32:54 16 number of the defendants involved in this case. It's what --
11:32:58 17 the reason I'm coming up now is that Mr. Freed just mentioned
11:33:04 18 it came up at the prior hearing. It was an antitrust case
11:33:08 19 involving a number of the containerboard manufacturers at
11:33:14 20 issue in this case or are defendants in this case.

11:33:14 21 And the reason Linerboard has come up on a number of
11:33:18 22 prior occasions here is with respect to whether or not in that
11:33:28 23 case whether there was discovery at the mill and box plant
11:33:34 24 level and what the scope of that discovery is. And it goes
11:33:38 25 much more broadly into the custodian issue. And what we have

11:33:42 1 here, the documents, just to make it clear for the record,
11:33:48 2 there was a meet and confer in that case on November 15th of
11:33:54 3 2000, actually, almost 11 years to the day that we had a meet
11:33:58 4 and confer in this case in Mr. Eimer's offices. But there was
11:34:02 5 the issue, the exact same issue, of whether or not we were
11:34:08 6 going to have in the first instance document discovery at the
11:34:14 7 mill and box plant level came up at that meet and confer. And
11:34:18 8 there is first a memorandum dated November 16th, 2000, from
11:34:24 9 plaintiffs' counsel, Mr. Twersky to defense counsel, and then
11:34:30 10 a confirming letter from defense counsel at Kirkland & Ellis
11:34:34 11 on November 27, 2000. And it makes very clear that document
11:34:38 12 discovery in the Linerboard case, an antitrust case involving
11:34:42 13 the containerboard industry, you couldn't get much more
11:34:46 14 analogous than what we have here, was limited to, quote,
11:34:48 15 defendants would search their headquarters and regional
11:34:52 16 offices, "regional offices" being, as we see in the November
11:34:56 17 27th, 2000, letter, if appropriate, depending on the structure
11:35:00 18 of the company. So not meaning mills or box plant. It's just
11:35:04 19 a function of how your corporate headquarters works.

11:35:08 20 Your Honor, the point is not that it may not be that
11:35:16 21 there is a particular sales representative that -- a mid-level
11:35:22 22 or a lower-level person that becomes relevant, a person at a
11:35:26 23 mill that becomes relevant, a person at a box plant that
11:35:28 24 becomes relevant. That's possible. As plaintiffs have
11:35:32 25 pointed out, in the Linerboard case, as a result of documents

11:35:36 1 collected from headquarters, as we have done in this case,
11:35:42 2 someone is identified and may need to be deposed and was in
11:35:46 3 the Linerboard case in a discrete handful of instances.

11:35:50 4 But on the custodian issue, what defendants have said
11:35:56 5 time and time again is that where we start, given the
11:36:02 6 allegations in this case, is at the headquarters level, is at
11:36:08 7 senior management. And if subsequent to that individuals are
11:36:12 8 identified that needed to be added as custodians or that need
11:36:16 9 to be deposed, then that is the appropriate time to have those
11:36:20 10 discussions.

11:36:20 11 To echo Mr. McKeown, your Honor, I went back and
11:36:28 12 looked at our 30(b)(6) letter. At page 2, PCA identified 14
11:36:46 13 custodians at its senior management level. Six of the 14,
11:36:52 14 almost half, and it's highlighted on page 2 and 3, are sales
11:36:58 15 and marketing, folks with sales and marketing functions. And
11:37:06 16 so the idea, again, that defendants haven't included those
11:37:12 17 folks, certainly in IP's case, certainly in PCA's case, and I
11:37:16 18 know this to be true for all defendants, those folks are
11:37:18 19 represented the appropriate way to get folks in the middle or
11:37:22 20 down the chain, to the extent they ever become relevant, is to
11:37:24 21 identify them, you know, through the discovery that's been
11:37:28 22 made available.

11:37:30 23 The last issue, again, because Mr. Freed raised it
11:37:34 24 with respect to PCA's position on the legal hold. Your Honor,
11:37:38 25 in my experience, the only time that litigation holds come up,

11:37:44 1 the only reason it becomes an issue, is when there's some
11:37:48 2 question of spoliation in the case. Right? That's why they
11:37:52 3 come up, because a party comes and says, Your Honor, we
11:37:56 4 haven't gotten something, there is some issue, there's
11:37:58 5 documents we expected, we didn't get them. Maybe the
11:38:02 6 documents were destroyed, maybe they were displaced, who
11:38:04 7 knows, we need to find out what happened with the litigation
11:38:06 8 hold. That's how it comes up.

11:38:08 9 Here it's coming up in a totally different context.
11:38:12 10 Here it's coming up, as the court said, to help plaintiffs --

11:38:16 11 THE COURT: Well, to increase potential -- to
11:38:20 12 increase the scope.

11:38:22 13 MR. FELLER: Absolutely. To increase the scope, to
11:38:24 14 help plaintiffs identify custodians, but it is part of a
11:38:28 15 negotiated, helpful process.

11:38:28 16 And so what PCA has said is, Okay, we are perfectly
11:38:34 17 willing to give you our legal hold subject to, you know, no
11:38:38 18 waiver of privilege and those sorts of things, but you can't
11:38:42 19 use it as a gotcha six months or two years from now to say
11:38:48 20 that some middle-level manager didn't get, you know, a
11:38:54 21 litigation hold, that you're going to use it for the purpose
11:38:56 22 that we have talked about, which is to help you identify
11:39:00 23 custodians. And, you know, I am perfectly willing to do that
11:39:04 24 if that's helpful, but, again, it's another example of -- you
11:39:08 25 know, for us of an issue where plaintiffs ask for something,

11:39:12 1 we say we will give it to them subject to using it for the
11:39:16 2 purpose for which it was intended. And so far, plaintiffs
11:39:18 3 have said they are not willing to agree to that.

11:39:20 4 So since it was raised, I wanted to make that clear
11:39:22 5 for the record. I appreciate that, your Honor.

11:39:24 6 THE COURT: Here's what I think. I think it is worth
11:39:26 7 it before everybody -- you know, before we just do the regular
11:39:30 8 old thing and set this down, I think we should take a half
11:39:36 9 hour, 45 minutes, what do you think you need, and I want to
11:39:42 10 see everyone take a deep breath and see if there are some
11:39:48 11 issues that we can carve out that can -- that parties can
11:39:56 12 still -- this isn't either/or. We are not giving up -- I
11:40:00 13 mean, I don't think this is either/or. We are trying to
11:40:02 14 figure out if there are discrete issues that we -- or large
11:40:08 15 areas of issues that people want to continue to try to work
11:40:12 16 on, or what do you think is ripe for briefing.

11:40:18 17 And Mr. Mogin, I want you to talk to your folks,
11:40:24 18 those issues, plus this is your issue and your issue alone,
11:40:28 19 are you really telling me you want to, it is going to be your
11:40:34 20 request, that I resume the hearing; or if you want to have a
11:40:42 21 -- you know, or do you want to do briefing on the issue,
11:40:46 22 because that seems to be like an -- you know, like a quicker
11:40:50 23 use of time or whatever you want; or do you want a stipulation
11:40:56 24 from the defendants that you have preserved your issue. I
11:41:00 25 mean, we could even set a time for you to argue it.

11:41:04 1 I mean, do you really want to brief it, or are you
11:41:08 2 trying to preserve your record for the appeal -- you know, for
11:41:16 3 an appeal. I don't know, you know, and if it's too much to
11:41:20 4 decide in 45 minutes, you can let us know on that particular
11:41:26 5 issue. That is not their issue. One thing we can agree on,
11:41:30 6 they don't want to go back to the hearing on this opening.

11:41:34 7 So that's your issue. So you said something about
11:41:36 8 going back to the hearing. Was that really -- do you really
11:41:40 9 want to go back to the hearing, or do you want to really do
11:41:44 10 briefing on it, do you want to set it down for oral argument.
11:41:50 11 So you will talk about that in the 45 minutes.

11:41:54 12 And I think what we should do, I want you -- I hope
11:42:00 13 somebody has been taking notes here, and you guys, you use
11:42:04 14 Judge Moran's jury room?

11:42:10 15 MR. McKEOWN: Yes, your Honor.

11:42:10 16 THE COURT: Half hour, 45 minutes, what do you think?

11:42:14 17 MR. McKEOWN: Half hour.

11:42:16 18 THE COURT: Half hour. Okay. Let's do a half hour,
11:42:16 19 and you come back, and you let me know. And then if we are
11:42:22 20 going to do briefing, Chris and I have some idea. It's going
11:42:26 21 to have to be a pretty quick kind of turnaround, but let us
11:42:30 22 know what issues we have got.

11:42:32 23 One thing I wanted to tell you is you probably know
11:42:36 24 who the two new magistrate judges are: Danny Martin, who is a
11:42:40 25 staff attorney at the Federal Defender; and Mary Rowland, who

11:42:46 1 is a plaintiff's -- I guess her firm is kind of associated
11:42:50 2 more as a plaintiff's civil rights but complex litigation
11:43:00 3 firm. But Judge Holderman has not decided who is getting what
11:43:04 4 caseload yet, so you basically don't know who your new judge
11:43:08 5 is.

11:43:10 6 If, in fact, you think there is any -- and here's
11:43:16 7 another thought too -- there's any purpose in our meeting, I
11:43:22 8 do have a number of days, I mean, if you want to do some of
11:43:26 9 this by oral argument too, we get briefs, do oral argument,
11:43:32 10 whatever is going to be the quickest to help you so we can get
11:43:34 11 finished by September 30th, I have a number of days we can
11:43:38 12 also do that. Okay?

11:43:40 13 So you guys go talk down the hall. Plaintiffs, you
11:43:42 14 have the courtroom.

11:43:44 15 MR. FREED: Thank you, your Honor.

11:43:46 16 MR. McKEOWN: Thank you, your Honor.

11:43:46 17 THE COURT: 12:15, Chris and I will come back out.
11:43:50 18 We will figure out lunch from there. Thank you.

11:43:54 19 (Short break.)

12:48:00 20 THE COURT: We are back on the record in Kleen
12:48:04 21 Products, 10 C 5711.

12:48:08 22 So the lawyers had an opportunity to have individual
12:48:12 23 caucuses and, if appropriate, joint caucuses.

12:48:18 24 So what do you have to report?

12:48:22 25 MR. EIMER: Good afternoon, your Honor. Dave Eimer

12:48:24 1 on behalf of International Paper.

12:48:26 2 MR. FREED: And Michael Freed, your Honor, for
12:48:26 3 plaintiffs.

12:48:28 4 THE COURT: Thank you.

12:48:30 5 MR. EIMER: Well, I am not sure that we quite got to
12:48:34 6 the point I had hoped in terms of having a package before you
12:48:36 7 to resolve it, but maybe we can work it out while we are
12:48:40 8 standing here.

12:48:40 9 THE COURT: Okay.

12:48:42 10 MR. EIMER: So I think we agree with Mr. Freed that
12:48:42 11 it's time to put certain matters before the court and have
12:48:46 12 them resolved.

12:48:48 13 THE COURT: Okay.

12:48:48 14 MR. EIMER: What we tried to do is to agree on what
12:48:50 15 it is to be resolved, and I think we didn't quite get there,
12:48:56 16 but a briefing schedule could do that.

12:48:58 17 I think we both agree that the defendants and I think
12:49:02 18 the plaintiffs would like the court to resolve whether the
12:49:06 19 defendants used an appropriate methodology, a reasonable and
12:49:10 20 fair methodology, for searching for their documents. It's not
12:49:14 21 the validation issue but only whether or not we need to be
12:49:18 22 compelled to use concept-based searching or whatever the
12:49:22 23 plaintiffs would like to refer to it as.

12:49:24 24 MR. FREED: Actually, I'm sorry Mr. Eimer started
12:49:26 25 with that one because I don't think that was an area where we

12:49:30 1 had agreement because this gets back to what was discussed
12:49:34 2 earlier, to do that, do we really want to resume the hearing.
12:49:36 3 And I think that that -- there's only so much I think your
12:49:40 4 Honor is going to be able to do before you leave the bench,
12:49:44 5 and I think that would be the exception as well as the rule.

12:49:46 6 So I appreciate their desire to get that issue
12:49:50 7 resolved, but I don't see how briefing is going to do it
12:49:54 8 because our brief would say, Well, we think we need to resume
12:49:56 9 the hearing.

12:49:58 10 MR. EIMER: Well, the need for resumption of the
12:50:00 11 hearing is fine with us. We believe the court has invested a
12:50:02 12 huge amount of time in this, established a record, and heard
12:50:02 13 the witnesses, and if that's still going to be hanging over
12:50:06 14 our heads, we would like this court to resolve it before your
12:50:10 15 Honor leaves the bench.

12:50:10 16 THE COURT: Right.

12:50:10 17 MR. MOGIN: If that's how we're going to go, your
12:50:14 18 Honor, and you had said I had a week or so to consider going
12:50:18 19 back into the hearings, one of the things that I do think
12:50:22 20 needs to be considered within that context is the issue that
12:50:24 21 we started with in the hearings and then got deferred, which
12:50:26 22 is the propriety of the collection of preservation effort. I
12:50:32 23 don't think that you could talk about search methodology
12:50:34 24 without that context.

12:50:36 25 THE COURT: And who was going to tell us about that?

12:50:38 1 Who was the witness that was going to tell us that?

12:50:42 2 MR. MOGIN: Well, there was some discussion by
12:50:46 3 Mr. Regard. You had some discussion from some of the other
12:50:50 4 defendant witnesses, and you had some discussion --

12:50:54 5 THE COURT: See, my recollection is you only had the
12:50:58 6 cross of Dan Regard, and then you wanted to call the linguist,
12:51:00 7 and Dr. Lewis had been on there quite a while already, but,
12:51:04 8 you know, you wanted to finish up Dr. Lewis.

12:51:08 9 MR. MOGIN: We had not completed Mr. Regard's
12:51:10 10 cross-examination.

12:51:10 11 THE COURT: No, I know. I know.

12:51:12 12 MR. MOGIN: And we were going to call Ms. Tenny.

12:51:14 13 THE COURT: Right.

12:51:14 14 MR. MOGIN: But right now with respect to collection
12:51:18 15 and preservation, the only issue -- the only evidence, I
12:51:22 16 believe, and I am sure I'll be corrected if I'm wrong, is the
12:51:26 17 is evidence that was uncontested from Mr. Hanner. The
12:51:32 18 defendant chose not to cross-examine Mr. Hanner or to present
12:51:38 19 any evidence on that issue.

12:51:42 20 MR. EIMER: The appropriateness of the collection and
12:51:42 21 preservation is unrelated to the methodology that's used. If
12:51:46 22 it was inappropriate, it's inappropriate for both. If it's
12:51:48 23 appropriate, it's appropriate for both. So we are just trying
12:51:50 24 to find out whether we had to use concept-based searching or
12:51:54 25 not. That's the simple issue. And I think the only thing

12:51:58 1 that had to be done to complete that were the things your
12:52:00 2 Honor outlined, the continued cross-examination of our
12:52:04 3 witnesses and then their linguist.

12:52:06 4 THE COURT: Let's go on to issue number two.

12:52:08 5 MR. FREED: I wish he hadn't chosen the first one
12:52:12 6 because I think we made more progress than that suggests.

12:52:14 7 MR. EIMER: We both agree that the time period should
12:52:16 8 be briefed.

12:52:16 9 THE COURT: Okay.

12:52:18 10 MR. EIMER: As well as we think, the defendants
12:52:20 11 think, the issue of backup tapes is related because I think
12:52:24 12 one interplays with the other, as your Honor mentioned before,
12:52:26 13 where we can show more flexibility on time period depending on
12:52:30 14 what happens with backup tapes. And Mr. Freed correctly says
12:52:34 15 there may be other electronic media besides backup tapes, but
12:52:38 16 that's my shorthand for it.

12:52:38 17 MR. FREED: But I would suggest separate briefs on
12:52:40 18 that because we don't see them as related issues, and they can
12:52:44 19 respond any way they wish, but we would like to just do a
12:52:50 20 separate briefing for those, separate opening brief.

12:52:52 21 THE COURT: Okay.

12:52:52 22 MR. EIMER: We will talk a little bit about briefing
12:52:54 23 schedule in a moment, but that's a different one.

12:52:58 24 We had proposed -- and I thought we had agreement on
12:53:00 25 this, maybe we don't. There was some discussion about

12:53:02 1 resolving the indexing question and moving forward on the
12:53:06 2 parsing question by having each defendant, to the extent
12:53:10 3 necessary, amend its formal responses to requests for
12:53:14 4 production to reflect what was actually searched for. We are
12:53:20 5 prepared to do that. I thought we had agreement on that.
12:53:22 6 Mr. Mogin wants instead something else. So I don't think we
12:53:26 7 have agreement on how to resolve the indexing question.

12:53:32 8 THE COURT: You're willing -- I think that might help
12:53:34 9 us if I knew what you actually have answered because we were
12:53:38 10 working on something from a year ago.

12:53:42 11 MR. EIMER: Right.

12:53:42 12 THE COURT: I mean, that's going to be hard for me to
12:53:46 13 do with 92 times seven.

12:53:48 14 MR. EIMER: Right.

12:53:52 15 THE COURT: So whether or not you agree, that could
12:53:54 16 be just helpful to the court.

12:53:58 17 MR. EIMER: And it essentially is the IP chart, and
12:54:02 18 the IP chart we think can be translated to the individual
12:54:06 19 requests. If the court wishes us to do that as an aid to the
12:54:10 20 court, we will be glad to do that as an aid to the court.

12:54:12 21 MR. MOGIN: Your Honor, the only thing that I wanted
12:54:14 22 to point out is the distinction between what was searched for,
12:54:18 23 which is what the defendants are proposing to do in their
12:54:20 24 response, and what was produced, what was, in fact, produced.
12:54:24 25 So the indexing issue goes to what was, in fact, produced, not

12:54:30 1 necessarily what was searched for.

12:54:32 2 THE COURT: Why aren't we calling this a rolling on
12:54:36 3 the request to produce that were issued? I don't understand
12:54:44 4 why. I know indexing is part of it. But the question of the
12:54:52 5 -- you know, let's just say Judge Shadur had ruled a year ago
12:54:56 6 or was asked to rule on the request to produce. I mean,
12:55:02 7 indexing is part of it, but there are 92 requests that I
12:55:08 8 imagined your opening brief, you have the burden on it, you're
12:55:12 9 going to say these are insufficient answers, correct?

12:55:18 10 MR. MOGIN: Yes, your Honor, but we don't want to do
12:55:18 11 this -- the whole point of our argument here is that we don't
12:55:22 12 want to do that in a vacuum. In other words, let's talk about
12:55:26 13 what's really been produced since the production seems to be
12:55:30 14 over the dam at this point.

12:55:32 15 THE COURT: All right.

12:55:34 16 MR. MOGIN: That's water over the dam. So let's talk
12:55:36 17 about what's actually been produced so they can say, for
12:55:40 18 example, in response to RPD No. 3, we searched for the
12:55:42 19 following, A, B, C, and we have produced items, 1, 2, and 3,
12:55:48 20 signed --

12:55:50 21 THE COURT: Isn't that what you're saying you do?

12:55:54 22 MR. EIMER: No.

12:55:54 23 MR. McKEOWN: No, your Honor. The chart that was
12:55:56 24 designed to show what it was that we searched for, if it was
12:56:00 25 found, the contract lawyers then marked those documents as

12:56:04 1 responsive, but they didn't keep a checklist that says, This
12:56:06 2 one is going to this request, that one is going to that
12:56:10 3 request. We looked at things in the entirety. If they were
12:56:12 4 responsive to any of the categories, they were marked
12:56:14 5 responsive and moved on.

12:56:16 6 And so what our chart does and what we would propose
12:56:20 7 to do amending the request for production is to state more
12:56:24 8 clearly, if that would help the plaintiffs, take what's in our
12:56:28 9 chart, essentially, and put it into the formal requests. If,
12:56:30 10 for example -- you know, there may be eight categories in one
12:56:36 11 type of request. We may have found documents for seven but
12:56:42 12 not for the eighth. But we are not going to go through our
12:56:46 13 million-plus pages of documents to try to sort them like that.

12:56:48 14 MR. EIMER: That's a huge undertaking the plaintiffs
12:56:50 15 can do as well as we can.

12:56:52 16 THE COURT: I thought what the court was doing was
12:57:00 17 saying -- see, I thought Mr. Mogin and Mr. Freed would be
12:57:12 18 saying they did not completely answer No. 3. I mean, we know
12:57:18 19 everybody answered somewhat. Okay?

12:57:20 20 Here was the request. The request said, Tell me all
12:57:32 21 people, and you guys came back on the people and said, we're
12:57:40 22 giving you the executives and the people who report to the
12:57:42 23 executives. I thought my job would be to say, Was that too
12:57:48 24 broad to begin with, or if I say, You don't have to -- I mean,
12:57:50 25 the way I look at it is I have to almost say, It's too broad,

12:57:54 1 here's what you got to give them. I mean, I could say it's
12:57:58 2 too broad, period. I could say -- I guess a judge could say,
12:58:06 3 I am not going to give you everything, but I will give you X.

12:58:10 4 MR. EIMER: Right.

12:58:10 5 THE COURT: I mean, what am I doing?

12:58:12 6 MR. EIMER: We are addressing that. That's what we
12:58:14 7 are addressing, exactly that.

12:58:14 8 MR. FREED: To point a finer point on it, your Honor,
12:58:20 9 what has happened a couple times --

12:58:20 10 THE COURT: Mr. Freed, what I am confused on, why you
12:58:22 11 keep saying indexing when it seems like indexing is what is
12:58:26 12 kind of like wagging the tail here. First we have to decide
12:58:30 13 the appropriateness of the 92.

12:58:34 14 MR. EIMER: Right.

12:58:36 15 MR. FREED: Well, I actually think there is a middle
12:58:36 16 ground which I would at least like to try to explain.

12:58:40 17 THE COURT: Good.

12:58:40 18 MR. FREED: A couple of times in the hearing, just to
12:58:42 19 illustrate the point, we have relied on the written words in
12:58:46 20 their responses which we object to the following, and we also
12:58:50 21 were aware, and this spills over into the parsing issue, that
12:58:54 22 they take the position that as long as they said they
12:58:58 23 objected, they didn't have to say what they were, in fact,
12:59:02 24 producing.

12:59:02 25 So we said, Look -- people stood up even though they

12:59:08 1 objected and said, Well, we objected, but here's the
12:59:10 2 documents, we responded. And that caught us by surprise, and
12:59:12 3 it made it very difficult for us in doing our own analysis of
12:59:16 4 their documents. So we said to them, Tell us what it is,
12:59:20 5 notwithstanding your objections, that you have produced.

12:59:24 6 THE COURT: Actually produced.

12:59:24 7 MR. FREED: Actually produced.

12:59:24 8 THE COURT: Okay.

12:59:26 9 MR. FREED: They said -- and we thought we had
12:59:28 10 agreement, but we didn't. They said, No, we will tell you
12:59:30 11 what we actually searched for but not what we actually
12:59:34 12 produced because that would be too difficult.

12:59:36 13 So we were getting toward --

12:59:38 14 THE COURT: I see.

12:59:40 15 MR. FREED: -- a method of resolving the issue, but
12:59:42 16 there was a difference as to how far they needed to go.

12:59:46 17 MR. EIMER: But the issue that the court is
12:59:48 18 addressing --

12:59:48 19 THE COURT: That's interesting because I hadn't -- I
12:59:52 20 didn't realize that.

12:59:52 21 MR. EIMER: But the issue the court is addressing,
12:59:56 22 which is looking at a request and seeing if it's too broad or
01:00:00 23 the whether our objection is adequate or not, what I believe
01:00:02 24 your Honor is going to look at is two-fold. One is to what
01:00:06 25 extent are we objecting to that request. And in looking at to

01:00:10 1 what extent we're objecting to it, your Honor, we think, would
01:00:10 2 look at what we searched for. Anything we searched for, we
01:00:14 3 produced. There is nothing we didn't search for we didn't
01:00:16 4 produce unless the documents didn't exist.

01:00:20 5 THE COURT: Now, wait. That's different than what
01:00:22 6 Mr. Mogin --

01:00:24 7 MR. EIMER: Exactly. That's my point.

01:00:24 8 THE COURT: Everything you searched for --

01:00:28 9 MR. EIMER: We produced if it existed. So there
01:00:30 10 could be a category of documents that didn't exist in our
01:00:32 11 files.

01:00:32 12 MR. FREED: If you thought it was responsive.

01:00:34 13 MR. McKEOWN: No. No. The chart was to define
01:00:36 14 responsiveness.

01:00:38 15 MR. FREED: Okay.

01:00:38 16 MR. EIMER: It's not that we searched for it and we
01:00:40 17 later decided we wouldn't produce it. Anything we searched
01:00:44 18 for, we produced if it existed. So the only that's missing
01:00:46 19 for them is things that didn't exist that aren't in our files.
01:00:50 20 So in dealing with whether or not the request is too broad or
01:00:54 21 not, I think what the court actually needs to look at is what
01:00:56 22 we agreed to produce if it existed, which is exactly what we
01:01:00 23 are telling the court and telling the plaintiffs.

01:01:02 24 THE COURT: Does that help clarify for you?

01:01:04 25 MR. MOGIN: It does, your Honor. But, remember, the

01:01:08 1 ultimate issue is not the propriety of the request. The
01:01:12 2 ultimate issue here is was the response correct. In other
01:01:14 3 words, are the objections justified. Are the exclusions
01:01:16 4 justified. Is the search, what they actually searched for, is
01:01:20 5 that justified. And then, ultimately, did they produce as
01:01:24 6 they represented in their responses to the RPDs and is that
01:01:28 7 production sufficient. So that's the linkage of the issues.

01:01:32 8 MR. EIMER: The parsing issue, as I understand it,
01:01:34 9 and as I think everybody would understand it, is only about
01:01:38 10 the adequacy of our search and whether or not we have
01:01:42 11 correctly objected to a document request or not. And your
01:01:44 12 Honor needs to decide whether it's too broad, whether our
01:01:46 13 objection is too broad. And in doing that, it's about whether
01:01:50 14 or not we are correctly searching for the documents that they
01:01:56 15 are entitled to get, and to make that determination, your
01:01:58 16 Honor, we need to know what we are searching for.

01:02:00 17 THE COURT: Mr. Neuwirth, yes, sir.

01:02:12 18 MR. NEUWIRTH: Thank you, your Honor. I actually --
01:02:14 19 as I said earlier, I need to leave. I have been told by the
01:02:14 20 Chicago natives that if I don't leave now, I will not make my
01:02:18 21 plane.

01:02:18 22 Given where we are in the process, I don't know if
01:02:20 23 it's feasible, because it turns out Ms. McLemore also has to
01:02:26 24 leave now, I have a dial-in number. If it's something that we
01:02:32 25 could use, we could listen, as best as we can. We won't

01:02:32 1 disrupt the hearing, but if that's something that the court
01:02:34 2 can dial into just so we can listen, that would be great. If
01:02:38 3 not, we understand.

01:02:38 4 My only parting remark, if I can make one, having
01:02:40 5 listened to this discussion, is that my understanding of the
01:02:44 6 issue here is that there was a concern on the part of the
01:02:48 7 plaintiffs that there was a disparity between what it was that
01:02:54 8 the defendants had said in their objections they were going to
01:02:58 9 produce and what they actually did produce. And I believe
01:03:04 10 that that may be true in some instances because my
01:03:08 11 understanding is that some defendants advised the plaintiffs
01:03:12 12 that, in fact, even though they had objected to certain
01:03:16 13 things, they had got on and produced anyway. And so my
01:03:20 14 understanding of what the plaintiffs want is that they would
01:03:24 15 like disparity to be corrected.

01:03:26 16 Now, I am not sure that every defendant would say
01:03:30 17 that there is such a disparity, but some may say that there
01:03:34 18 was. And if what the plaintiffs are requesting is that that
01:03:38 19 disparity be resolved as a way to litigate the issue that
01:03:44 20 triggered the request for indexing, my understanding is that
01:03:46 21 the defendants would be willing to try to do that to the
01:03:50 22 extent that it's necessary to resolve those disparities.

01:03:54 23 That's my parting effort to reach a resolution. I
01:03:58 24 will give this number --

01:03:58 25 THE COURT: Have a safe trip.

01:04:00 1 MR. NEUWIRTH: Thank you very much.

01:04:00 2 THE COURT: This is interesting.

01:04:02 3 MR. NEUWIRTH: And if the next hearing is not on a
01:04:04 4 Friday, that would be wonderful.

01:04:06 5 THE COURT: Thank you. We will make sure that it's
01:04:08 6 not.

01:04:10 7 MR. FREED: Let me make a proposal which maybe will
01:04:12 8 get us halfway there, which is if defendants are willing to do
01:04:16 9 that anyway, to do it, and then we can pick up the discussion
01:04:18 10 further.

01:04:20 11 MR. EIMER: I am fine with that as long as we set a
01:04:22 12 briefing schedule.

01:04:22 13 MR. FREED: And that's okay too.

01:04:24 14 MR. EIMER: For IP, we will do it and see if it
01:04:28 15 helps.

01:04:28 16 MR. FREED: Maybe sometimes you actually see how they
01:04:30 17 responded. It may help us crystallize our thoughts too.

01:04:36 18 MR. EIMER: We will take the chart -- IP will take
01:04:38 19 the chart that we have already submitted to the plaintiffs and
01:04:40 20 to the court and translate that into formal objections, which
01:04:44 21 is what Mr. Mogin asked for, to the document requests so that
01:04:48 22 we can see what we actually produced and what we didn't --
01:04:52 23 what we actually searched for and what we didn't search for
01:04:54 24 under the document request.

01:04:56 25 At the same time, I think it's clear that these

01:04:58 1 issues need to be resolved by the court. This doesn't help
01:05:00 2 them resolve it, fine. So I think we should list then the
01:05:04 3 indexing issue and the parsing issue as issues that need to
01:05:08 4 get resolved by the court through motion practice. If we can
01:05:14 5 resolve it before that or limit it in some way, great. But if
01:05:16 6 not, I think we have spent enough time. It's clear we are at
01:05:20 7 an impasse. We can't even agree on this, apparently. I think
01:05:22 8 we need to set it down for a briefing.

01:05:24 9 MR. MOGIN: Your Honor, I would like to agree to what
01:05:26 10 Mr. Eimer proposed and what Mr. Neuwirth proposed. The issue
01:05:30 11 is that Mr. Eimer doesn't really agree with what Mr. Neuwirth
01:05:34 12 just proposed. So it's a two-step process. The first is,
01:05:40 13 what did you actually search for. That's the chart --

01:05:46 14 MR. FREED: Notwithstanding what you said.

01:05:48 15 MR. MOGIN: What you said. And that's what Mr. Eimer
01:05:48 16 is talking about.

01:05:50 17 The second step is, that said, what did you actually
01:05:52 18 produce. That's the second step that Mr. Neuwirth is talking
01:05:56 19 about. We think both would be helpful, but if only one is
01:06:04 20 achievable, let's start with Mr. Eimer. But that will not
01:06:08 21 resolve the parsing issue. Whereas if we do both
01:06:12 22 simultaneously, then that will probably resolve a huge piece
01:06:16 23 of the parsing issue.

01:06:18 24 MR. EIMER: It absolutely does resolve the parsing
01:06:20 25 issue.

01:06:20 1 THE COURT: It does.

01:06:22 2 MR. EIMER: It absolutely resolves the parsing issue
01:06:24 3 if we do -- if IP does what it said it would do. The parsing
01:06:28 4 issue is solely about what the parties looked for. That's
01:06:28 5 what it is. It's got nothing to do with what was produced.
01:06:32 6 The question of production is whether we adequately complied
01:06:34 7 with what we said we would do in our objections and our
01:06:36 8 response to the document request. If they want to bring a
01:06:38 9 motion to compel later that we didn't produce certain
01:06:42 10 categories of documents that we had agreed to produce, they
01:06:44 11 can do that after they review the documents. That is not for
01:06:46 12 now. What we are talking about now is did we properly object
01:06:50 13 and narrow their document requests by what we agreed to search
01:06:54 14 for.

01:06:56 15 THE COURT: Has anyone else done what IP has done
01:06:58 16 that they could also -- would that help if somebody else has
01:07:02 17 done what IP has done?

01:07:04 18 MR. MOGIN: Of course it would, your Honor, but
01:07:06 19 nobody has agreed to.

01:07:08 20 MR. NEUWIRTH: And part of it, your Honor, this goes
01:07:10 21 back to the point before, we did the chart. I think other
01:07:12 22 defendants, I don't want to speak for them, but other
01:07:14 23 defendants are hesitant to go through all the extra work if
01:07:18 24 it's not going to make any difference in trying to resolve the
01:07:20 25 issues.

01:07:20 1 THE COURT: Other defendants, come up here just for a
01:07:22 2 second here. One for each. We don't need everybody.

01:07:28 3 So are you willing to -- Mr. Tenor, it's going to be
01:07:34 4 kind of push the briefing back a little tiny bit, but are you
01:07:42 5 willing -- when can you do this, Jim? Are you going to take
01:07:46 6 the lead on this? Are you giving them something first and
01:07:52 7 then they are taking a look at it? Is that what this is?

01:07:56 8 MR. McKEOWN: Well, I think they already have the
01:07:56 9 essence of it in our chart.

01:07:58 10 THE COURT: Because that was attached yesterday.

01:08:00 11 MR. McKEOWN: We will take the chart and translate it
01:08:02 12 into the more formal objections. But the essence of what we
01:08:06 13 already did is already in the chart.

01:08:08 14 MR. EIMER: So they know what we searched for.

01:08:10 15 THE COURT: So how quickly can you get them there?

01:08:12 16 MR. McKEOWN: One week, Mr. Johnson? One week.

01:08:16 17 THE COURT: Well, how long are you going to need to
01:08:20 18 get them a response back?

01:08:22 19 MR. MOGIN: I wouldn't be responding, your Honor,
01:08:26 20 until after, of course, we have reviewed it, but that doesn't
01:08:28 21 get to the second issue of what was actually produced.

01:08:32 22 So if we have to go this route, I don't believe it's
01:08:34 23 particularly efficient. I think the more efficient thing to
01:08:38 24 do is to resolve the parsing issue and the indexing issue at
01:08:42 25 the same time through the vehicle of the revised or amended,

01:08:46 1 if you will, formal response to the document production, and
01:08:50 2 then at that point, I think we may have resolved indexing, we
01:08:56 3 may have resolved a huge piece of the parsing puzzle, and to
01:09:00 4 the extent there have to be further motions to compel on
01:09:04 5 discrete issues, discrete RPDs, we will know precisely what
01:09:08 6 they are, and we can do it on a much more expedited basis than
01:09:14 7 otherwise required.

01:09:14 8 THE COURT: So Proposal A on the table -- I am so
01:09:18 9 confused on this -- would be, Jim, Mr. McKeown and IP, would
01:09:24 10 be giving you the chart they already did. You then would
01:09:28 11 analyze that, but that isn't really your first pick. Your
01:09:34 12 first pick is actually each one of them tell you what did they
01:09:42 13 actually produced under each of the 92 answers. Correct or
01:09:50 14 not?

01:09:50 15 MR. MOGIN: Correct, except, your Honor, if they are
01:09:56 16 going to want some approval, court approval, of their search
01:09:58 17 methodology, then we have to have step one.

01:10:02 18 THE COURT: So what you're saying is each of the
01:10:08 19 seven of them would have to do what Mr. McKeown has done.

01:10:12 20 MR. MOGIN: And what Mr. Neuwirth agreed to do.

01:10:18 21 MR. McKEOWN: I don't think he agreed to what you
01:10:20 22 think.

01:10:22 23 THE COURT: Of course, I was interested -- I am
01:10:24 24 interested if there is a potential of not having to rule on
01:10:28 25 666. So I was interested if there is a way around this.

01:10:34 1 MR. MOGIN: So let me just explain one more time, if
01:10:36 2 I can, please, for clarifications purposes.

01:10:38 3 Assume that Mr. Eimer does all the things that he
01:10:42 4 said he was going to do, that tells us precisely what each
01:10:48 5 defendant searched for in response to each RPD. That tells us
01:10:54 6 something about the production, but it doesn't get us where we
01:10:58 7 need to go with respect to the production.

01:11:00 8 Then the issue is, the open piece, is what did they
01:11:06 9 actually produce as a result of that search in terms of
01:11:12 10 categories of documents or something to that effect. In other
01:11:14 11 words, your Honor, what we are trying to do with the second
01:11:18 12 step is close the gap, if there is any, for each RPD with
01:11:24 13 respect to any variance from what they said they searched for
01:11:26 14 and what they, in fact, actually produced. If plaintiffs had
01:11:30 15 all that information and it was within a compliant Rule 34
01:11:36 16 document, we'd have resolved the indexing issue, we'd have
01:11:40 17 resolved, as I said, an enormous, an enormous percentage of
01:11:46 18 the parsing issue. The necessity for motions to compel as to
01:11:50 19 any particular one is reduced, again, enormously.

01:11:56 20 THE COURT: All right. Two things. Do the rest of
01:12:00 21 you have plans for the afternoon? Because, truthfully, I
01:12:08 22 think the most complicated issue here briefing-wise, I
01:12:14 23 actually can deal with word search, I can deal with -- I
01:12:18 24 actually can deal with time scope. Those are traditional.

01:12:24 25 If from the judge's standpoint I have to give

01:12:28 1 individual consideration to 92 requests to produce times
01:12:34 2 seven, because you all didn't answer it exactly the same, I
01:12:38 3 know there are some similarities and I know they are broken
01:12:42 4 down, if there would be -- if you went to lunch for an hour
01:12:48 5 and talked among yourselves, obviously, I am not trying to get
01:12:52 6 you all to agree, but if there is a way to do this
01:12:56 7 procedurally, maybe it's worth an hour right now rather than
01:13:00 8 just set down a straight old briefing is what I am saying.

01:13:06 9 Mr. Marovitz, you look like you could help me out.

01:13:14 10 MR. MAROVITZ: I'm not sure I will, but -- go ahead.

01:13:16 11 THE COURT: This is tricky. This is like tricky
01:13:20 12 here. What we can do is we can wait and see if Mr. McKeown's
01:13:24 13 method works, but then we have pushed back briefing two more
01:13:30 14 weeks into the September 30th is the problem.

01:13:32 15 MR. McKEOWN: Your Honor, if I might, I think we have
01:13:34 16 some semantic issues here, but I want to make sure we are all
01:13:40 17 on the same page. There is the question of what was searched
01:13:42 18 for --

01:13:42 19 THE COURT: Right.

01:13:42 20 MR. McKEOWN: -- and what the objections said. There
01:13:44 21 is, at the end of the day, the question of what was physically
01:13:48 22 produced.

01:13:48 23 THE COURT: Right.

01:13:48 24 MR. McKEOWN: The original issue that we understood
01:13:54 25 with the parsing was that the plaintiffs were concerned that

01:13:58 1 we were saying, These were our objections but we actually
01:14:02 2 searched for and produced more than that. And that then our
01:14:06 3 proposal, if it would resolve the indexing issue, would be, We
01:14:12 4 have given you the chart, the chart shows what we have
01:14:14 5 searched for, and if we found it, it was produced.

01:14:16 6 THE COURT: Produced, correct.

01:14:18 7 MR. McKEOWN: But it could be that there is a request
01:14:22 8 for which there is no document that is responsive, and we
01:14:24 9 don't have a way of identifying that in an easy manner. We
01:14:28 10 can take our original objections and conform them to what's in
01:14:32 11 the chart to say, This is what we searched for and to the
01:14:36 12 extent that those documents existed, and for a number of the
01:14:40 13 categories, we may be able to say, Yeah, we know we have
01:14:42 14 these. But there are some we just don't know. But what we
01:14:46 15 can say is what we searched for and if it was found in this
01:14:50 16 grouping, it was produced.

01:14:52 17 And our disconnect, I think, is that I believe what
01:14:54 18 Mr. Mogin is saying is he wants us to identify what is in
01:14:58 19 this --

01:15:02 20 MR. MOGIN: Right.

01:15:02 21 MR. McKEOWN: -- and what was not.

01:15:04 22 THE COURT: What I got out of the defendants' seven
01:15:08 23 responses yesterday, and particularly Mr. Feller's, were if
01:15:14 24 you guys would say they would each do what Mr. McKeown has
01:15:22 25 done and will do in the next week, if you will say we are not

01:15:28 1 doing an omnibus request to produce motion now, the tradeoff
01:15:36 2 is -- like it or not, the tradeoff is if they do these charts
01:15:44 3 and you have any questions in the future about the scope, you
01:15:52 4 are going to stop saying this motion to compel is out there.
01:15:58 5 Am I correct, defendants? They will do what he did, not
01:16:02 6 saying that you can't ask for a specific request, but this
01:16:08 7 motion hanging over their head cannot exist.

01:16:10 8 Now, to me, that would seem like something you could
01:16:14 9 talk about for an hour over lunch.

01:16:16 10 MR. FREED: Yeah. I think that's very constructive.
01:16:18 11 Let me see -- it would help me to restate it to see if I
01:16:24 12 understand it.

01:16:24 13 If the other defendants agreed to do as Mr. McKeown
01:16:28 14 has done, probably skipping the middle step of the chart but
01:16:32 15 actually doing the formal response, saying what they object to
01:16:36 16 and what they don't object to so we don't have this
01:16:40 17 netherworld where they object but also produce, then we would
01:16:46 18 accept that at this time defer moving to get the actual
01:16:52 19 identification of what was produced, but we would still be
01:16:56 20 able to do that in the future.

01:17:06 21 MR. MAROVITZ: Andy Marovitz. That's exactly what we
01:17:08 22 want to avoid. We want to have resolution of certain matters.
01:17:16 23 I believe that what Mr. Freed and what Mr. Mogin are arguing
01:17:20 24 for are slightly different.

01:17:22 25 THE COURT: Maybe that's true.

01:17:24 1 MR. MAROVITZ: If it will resolve matters for us to
01:17:30 2 put together the information like IP did and it will resolve,
01:17:32 3 as your Honor just said, an omnibus motion to compel with
01:17:38 4 modest exceptions for specific matters, we are interested in
01:17:44 5 that. We are not interested, and I will speak for me,
01:17:48 6 Temple-Inland are not interested in doing what we did in the
01:17:50 7 depositions. The reason I exercised this is I led the charge
01:17:54 8 on the deposition letter writing. Back in the fall, I was at
01:17:58 9 the meeting present and I suggested, it was my recommendation,
01:18:02 10 that we avoid all of these depositions if we could by
01:18:06 11 providing the information in writing in advance in detail.
01:18:10 12 And I asked my partner, Ms. Miller, to do that, and she spent
01:18:14 13 a lot of time doing it, and I only did it when I was told
01:18:18 14 that, Yes, if what you have put in the letter is reasonably
01:18:22 15 responsive, we won't go ahead with the depositions. And our
01:18:26 16 30(b)(6) deposition took two days.

01:18:28 17 So I am very interested in reaching finality on these
01:18:32 18 issues. And this is going to be unpopular, but I am going to
01:18:36 19 say it anyway. I do not believe that a hour lunch is going to
01:18:42 20 reach finality. I think that we are best served by simply
01:18:44 21 teeing these up for briefs. I only speak for myself.
01:18:48 22 Mr. McKeown and others may have a different view. I just
01:18:50 23 think we are going to need the court's guidance. I think all
01:18:54 24 the parties need the court's guidance on these issues so that
01:18:56 25 we can get them behind us and move forward.

01:19:02 1 MR. GOODWIN: Your Honor, if I may address that
2 because I can talk in concrete terms about GP's written
3 responses to our discovery request.

4 THE COURT: And since they're not here.

5 MR. GOODWIN: I really do, but --

6 THE COURT: If we can get them on the phone.

01:19:08 7 MR. GOODWIN: I really don't think there's going to
01:19:10 8 be much -- there would be much disagreement here because I
01:19:14 9 actually think, you have seen the document we gave the court
01:19:18 10 during the meet and confer. I have about 40 requests if I
01:19:20 11 look just at what GP has given me a written answer on that I
01:19:24 12 could potentially file a motion to compel on. I think,
01:19:28 13 however, with some input from GP and some -- you know, you
01:19:32 14 made that objection, but did you ignore that objection when
01:19:36 15 you produced, what do you mean by this thing, that number
01:19:40 16 probably becomes less than a dozen. And I think the court
01:19:44 17 suddenly is maybe resolving perhaps one global issue and maybe
01:19:50 18 five or six individual issues, and the burden on the court
01:19:54 19 becomes a lot less.

01:19:56 20 Not everyone in the room was present when we had that
01:20:00 21 meet and confer, but, you know, you had us very sincerely
01:20:06 22 saying, Well, you told us you are giving us this, and we need
01:20:10 23 more than you've told us you're giving. And then Mr. Neuwirth
01:20:16 24 came forward and brought three boxes of documents to show how
01:20:16 25 fulsome his production had been on those very topics.

01:20:20 1 I don't want to move on something -- write a motion
01:20:22 2 to compel only get to get a response from GP saying, We gave
01:20:26 3 that to you. I want to file something that's a good use of
01:20:30 4 the court's time, a good use of my time, and a good use of his
01:20:34 5 time.

01:20:34 6 THE COURT: But one thing that we are in this weird
01:20:42 7 procedural posture because the requests to produce were
01:20:44 8 written a year ago, and as you guys love to -- you guys and
01:20:44 9 ladies love to say, you now have produced nine million pieces
01:20:48 10 of paper. Okay? So the landscape has changed from the time
01:20:54 11 it was written.

01:20:54 12 So, Mr. Marovitz, I walked out here at 10:00 o'clock,
01:20:58 13 and I didn't -- I thought some of the other issues were the
01:21:04 14 one that really still lent themselves to conversation. I
01:21:12 15 thought there was probably nothing to do with this request to
01:21:16 16 produce, but Chris and I put a gun to our head and got
01:21:20 17 Margaret in this too. I didn't know.

01:21:22 18 Now it seems like there is some room here because
01:21:28 19 there is a question between -- if the search and the
01:21:32 20 production is the same, we do now know that, at least from
01:21:36 21 Mr. McKeown, what he searched for. If it existed, he
01:21:40 22 produced. So that answers a big part of the question.

01:21:50 23 Where is it in the document that's the, quote
01:21:54 24 unquote, indexing, that's been an issue from -- that's like
01:21:58 25 separate. Then there is the scope of what they asked for, and

01:22:04 1 they call it parsing. I call it, you know, completeness of
01:22:08 2 the answer. Or, you know, you have -- they asked for A and
01:22:12 3 you gave them B. And am I going to require B, or am I going
01:22:20 4 to require A minus, basically.

01:22:26 5 MR. EIMER: Right. That's right.

01:22:28 6 MR. FREED: I know Mr. Marovitz won't agree, probably
01:22:32 7 won't agree with me, I don't see the disadvantage for them and
01:22:34 8 the other defendants doing what IP has done and at least
01:22:40 9 saying to us, Notwithstanding the objections we made, this is
01:22:42 10 what we produced, or stated another way --

01:22:46 11 THE COURT: They just said to you loud and clear,
01:22:48 12 Mr. Freed, they have spent enough time and enough money on
01:22:50 13 their client's sake and the one client walked out of the room.
01:22:54 14 They will do it if you will just say, This is one issue that's
01:23:02 15 off the table from now is an omnibus -- Mr. Marovitz doesn't
01:23:08 16 want to do this, but everybody else wants to do this, or
01:23:12 17 maybe, we don't have to do an omnibus request to permit with
01:23:18 18 the caveat that you -- if you're not happy with specific
01:23:22 19 answers or you discover stuff after you do the review, you can
01:23:26 20 go back to them, but you could go back to them anyway.

01:23:34 21 Some of them are shaking their head, they would agree
01:23:38 22 to that. Ms. Miller is just dying to do another motion here.

01:23:44 23 MR. MAROVITZ: I can't tell if Ms. Miller is looking
01:23:48 24 at me or you, Judge.

01:23:48 25 THE COURT: Here is what my question is. Now almost

01:23:50 1 everybody except this group over here is from Chicago. What
01:23:52 2 about taking 45 minutes now that -- and just come back? I
01:23:58 3 want to give you my dates. I have actually dates. I felt sad
01:24:08 4 about this morning, actually, so now I am over my sad. I
01:24:12 5 would like to see you come back, we will get Mr. Neuwirth in
01:24:16 6 the cab or the airport, wherever he is, talk about
01:24:20 7 particularly the request to produce. We will have it
01:24:24 8 perfectly clear what the understanding is so there is no going
01:24:28 9 back on this. And then is there any hope on any other
01:24:34 10 agreement. I have days. Some of our individual meetings went
01:24:40 11 better than others. We could do some short individual if that
01:24:44 12 would help and not have to drag everybody through this, or we
01:24:50 13 could go back to oral argument.

01:24:52 14 This is the other thing I wanted to stress. Because
01:24:54 15 of our time running out, we could do short motions on certain
01:24:58 16 issues, come in, oral argument, and I will rule. If I have
01:25:08 17 your briefs -- if I have a short brief beforehand and then you
01:25:10 18 have an opportunity to answer back. I am open to anything to
01:25:14 19 help get as much resolved as possible.

01:25:18 20 MR. FREED: What about a short date, your Honor, and
01:25:20 21 then maybe a joint status report, which will at least give
01:25:24 22 us --

01:25:24 23 THE COURT: Let's just do lunch at the moment. We
01:25:26 24 are doing -- I am starving. Can't you catch the old lady is
01:25:32 25 starving?

01:25:34 1 MR. EIMER: You were going to give us the dates you
01:25:36 2 were available?

01:25:36 3 THE COURT: I had tons of dates.

01:25:38 4 The first one is a week from Wednesday. I just did
01:25:56 5 it. I highlighted it.

01:26:02 6 That would help you to talk about it at lunch too.
01:26:06 7 Just one minute. I just did one, and I highlighted every date
01:26:10 8 through September 28.

01:26:20 9 So that is Wednesday, September 25th.

01:26:26 10 MR. MOGIN: July.

01:26:26 11 MR. EIMER: July.

01:26:28 12 THE COURT: July 25th. The next -- then we are back
01:26:34 13 the week of August 6th. So Wednesday, July 25th. And I can
01:26:54 14 do Thursday, August 9th. Then I can do Wednesday, August
01:27:00 15 15th. Friday isn't good for Mr. Neuwirth, but I could do the
01:27:08 16 17th.

01:27:10 17 Then the next week, Tuesday, August 21st. So that's
01:27:20 18 like one a week. And then we get into the week of August
01:27:26 19 27th. I have three days. I have Monday, Tuesday, Wednesday.
01:27:30 20 After Labor Day, Tuesday. The week after that finally it
01:27:34 21 starts to open up. The week of September 10th I can do all
01:27:38 22 four days, five days. No, four days, Tuesday through Friday.

01:27:42 23 MR. MOGIN: Your Honor, with respect to some of those
01:27:44 24 dates --

01:27:44 25 THE COURT: You do have a life, Mr. Mogin? You have

01:27:48 1 a life outside of this?

01:27:50 2 MR. MOGIN: I'm trying. I have Ninth Circuit
01:27:58 3 conference the week of the 10th, and because of its location,
01:28:04 4 I'm taking an extra week.

01:28:04 5 THE COURT: Oh, you're going. That's right. And
01:28:06 6 you're in big trouble with -- not you, but your chief judge is
01:28:06 7 in big trouble.

01:28:08 8 MR. MOGIN: Fortunately, he has lifetime tenure. B,
01:28:12 9 my tenure is up on that committee.

01:28:14 10 THE COURT: So you are going to Hawaii the week of
01:28:16 11 August 6th --

01:28:18 12 MR. MOGIN: No, the week of the 12th I'm out, and the
01:28:22 13 whole week of the 19th, I'm out.

01:28:24 14 MR. EIMER: Of August?

01:28:26 15 MR. MAROVITZ: Of August?

01:28:26 16 MR. MOGIN: Yes.

01:28:26 17 THE COURT: So you are going to talk about that. Any
01:28:28 18 other weeks of time people are gone?

01:28:32 19 MR. FREED: I am around the whole time other than
01:28:34 20 August 9th.

01:28:34 21 THE COURT: So you, you are as boring as I am. I am
01:28:38 22 going to Mississippi on that one week. How would you like to
01:28:42 23 go to Mississippi in August, 110 degrees per day? Mr. Mogin
01:28:46 24 has the better end of that one.

01:28:50 25 Go to lunch, and we will talk. That will give you

01:28:54 1 some idea.

01:28:56 2 MR. EIMER: Is there anything after September 14th?

01:28:58 3 THE COURT: Yes, I do. You can be here right to my
01:29:02 4 party. You can leave here and go down to the party.

01:29:06 5 MR. EIMER: We will be there.

01:29:08 6 MR. MOGIN: You will rule, and depending on how you
01:29:14 7 rule will depend on who goes to the party.

01:29:16 8 MR. MAROVITZ: Judge, very quickly, not a substantive
01:29:16 9 argument, I hope I can be released at 3:30.

01:29:20 10 THE COURT: You can. We are going to be finished.

01:29:22 11 MR. MAROVITZ: That's great. And, second, my only
01:29:24 12 point from before is we really need to have clarity on
01:29:26 13 whatever it is that is going to be decided.

01:29:28 14 THE COURT: Come back at 2:15. Go to Corner Bakery,
01:29:34 15 quick. Bye.

01:29:34 16 We will call Mr. Neuwirth -- I'm going to call
01:29:38 17 Mr. Neuwirth on the phone and tell him we are going to call
01:29:40 18 him at 2:15 Chicago time.

01:29:50 19 MR. FELLER: He won't be available. His flight is at
01:29:52 20 2:30.

01:29:54 21 THE COURT: Just as a courtesy, we will call him.

01:30:00 22 (The hearing was adjourned at 1:30 p.m. until 2:15 p.m. of
01:30:08 23 this same day and date.)

24

25

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS, LLC, et al.,	}	Docket No. 10 C 5711
Plaintiffs,		
vs.		
PACKAGING CORPORATION OF AMERICA,	}	Chicago, Illinois
et al.,		July 13, 2012
Defendants.		2:15 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MAGISTRATE JUDGE NAN R. NOLAN
VOLUME 1-B

APPEARANCES:

For the Plaintiffs:

THE MOGIN LAW FIRM
BY: MR. DANIEL J. MOGIN
707 Broadway, Suite 1000
San Diego, CA 92101
(619) 687-6611

FREED KANNER LONDON & MILLEN LLC
BY: MR. MICHAEL J. FREED
MR. ROBERT J. WOZNIAK
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
(224) 632-4500

SCOTT & SCOTT
BY: MR. WALTER W. NOSS
707 Broadway, Suite 1000
San Diego, CA 92101
(619) 233-4565

Court Reporter:

MS. CAROLYN R. COX, CSR, RPR, CRR, FCRR
Official Court Reporter
219 S. Dearborn Street, Suite 1854-B
Chicago, Illinois 60604
(312) 435-5639

1 APPEARANCES CONTINUED:

2 For the Plaintiffs
3 (Cont'd)

GRANT & EISENHOFER
BY: MR. ROBERT G. EISLER
123 Justison Street, 7th Floor
Wilmington, DE 19801
(302) 622-7030

5 BERGER & MONTAGUE, P.C.
6 BY: MR. CHARLES PEARSALL GOODWIN
1622 Locust Street
7 Philadelphia, PA 19103
(215) 875-3000

8 LOCKRIDGE GRINDAL NAUEN PLLP
9 BY: MR. BRIAN D. CLARK
100 Washington Avenue S.
10 Minneapolis, MN 55401
(612) 239-6900

11 MILLER LAW LLC
12 BY: MR. MATTHEW E. VAN TINE
115 South LaSalle Street
Suite 2910
13 Chicago, IL 60603
(312) 332-3400

14
15 For Defendant Packaging
16 Corporation of America:
17 KIRKLAND & ELLIS LLP
BY: MR. LEONID FELLER
300 North LaSalle Street
Chicago, IL 60654
(312) 862-3144

18 For Defendant
19 International Paper:
20 FOLEY & LARDNER LLP
BY: MR. JAMES T. McKEOWN
MR. NATHAN EIMER
MR. TRENT M. JOHNSON
21 777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5530

22
23 EIMER STAHL LLP
24 BY: MR. NATHAN P. EIMER
224 South Michigan Ave., Suite 1100
Chicago, IL 60604
25 (312) 660-7600

1 APPEARANCES CONTINUED:

2 For Defendant
3 Temple-Inland:

MAYER BROWN LLP
BY: MR. ANDREW S. MAROVITZ
MS. BRITT M. MILLER
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

6 For Defendant
7 Cascades and Norampac:

K & L GATES LLP
BY: MS. LAUREN NORRIS
70 West Madison Street, Suite 3100
Chicago, IL 60602
(312) 372-1121

9 For Defendant
10 Georgia-Pacific:

QUINN EMANUEL URQUHART &
SULLIVAN LLP
BY: MR. SAMI RASHID
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

13 GEORGIA-PACIFIC
14 BY: MS. MARY K. McLEMORE
15 133 Peachtree Street, N.E.
16 P.O. Box 105605
Atlanta, GA 30348
(404) 652-4598

17 For Defendant
18 RockTenn CP, LLC:

WINSTON & STRAWN LLP
BY: MR. MICHAEL MAYER
MR. JOSEPH L. SIDERS
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5902

21 For Defendant
22 Weyerhaeuser Company:

McDERMOTT WILL & EMERY LLP
BY: MS. JENNIFER A. SMULIN DIVER
227 West Monroe Street, Suite 4400
Chicago, IL 60606

24

25

02:21:50 1 (The following proceedings were had in open court:)

02:21:50 2 THE COURT: We are back on the record in Kleen,
02:21:54 3 10 C 5711.

02:21:54 4 I think we should do another roll call just so the
02:21:58 5 record is complete. Mr. Mogin, will you -- we will get to you
02:22:02 6 in a moment, whoever is on the phone, but we are going to have
02:22:06 7 the plaintiffs introduce themselves first. Are you there,
02:22:08 8 person on the phone?

02:22:10 9 MR. RASHID: Yes, I am, your Honor.

02:22:12 10 THE COURT: Good. We will start with the plaintiffs.

02:22:14 11 MR. MOGIN: For the plaintiffs, your Honor, Daniel
02:22:16 12 Mogin, Michael Freed, Robert Wozniak, Robert Eisler, Charles
02:22:24 13 Goodwin, Walter Noss, Brian Clark, Matt Van Tine.

02:22:30 14 THE COURT: Thank you. And for our defendants,
02:22:36 15 Georgia-Pacific usually goes first because they are listed
02:22:38 16 first, and Mr. Neuwirth had a plane to catch so he has an
02:22:44 17 associate on the phone.

02:22:44 18 Sir, we are in the courtroom and we are on the record
02:22:48 19 and we have a court reporter. So would you state your name
02:22:52 20 for the record, please.

02:22:52 21 MR. RASHID: Yes, it's Sami Rashid, R-a-s-h-i-d,
02:23:02 22 Quinn Emanuel, for Georgia-Pacific.

02:23:02 23 THE COURT: All right. Thank you.

02:23:06 24 Mr. McKeown, you can go next.

02:23:08 25 MR. McKEOWN: James McKeown for International Paper.

02:23:12 1 THE COURT: I'm sorry, Mr. McKeown, I keep calling
02:23:14 2 you Mr. McGowan.

02:23:14 3 MR. McKEOWN: For International Paper. Also Nate
02:23:16 4 Eimer and Trent Johnson.

02:23:18 5 THE COURT: Thank you.

02:23:20 6 MS. DIVER: Jennifer Diver for Weyerhaeuser Company.

02:23:20 7 THE COURT: Thank you, Ms. Diver.

02:23:20 8 MR. FELLER: Leonid Feller for Packaging Corporation.

02:23:20 9 THE COURT: Okay.

02:23:28 10 MS. NORRIS: Laura Norris for Norampac/Cascades.

02:23:28 11 THE COURT: Thank you.

02:23:32 12 MR. MAROVITZ: Andy Marovitz and Britt Miller for
02:23:32 13 Temple-Inland.

02:23:32 14 THE COURT: Okay.

02:23:34 15 MR. MAYER: Mike Mayer and Joe Siders for RockTenn
02:23:36 16 CP.

02:23:36 17 THE COURT: Thank you. Thank you, Mr. Siders.

02:23:38 18 Is that it? Okay. Good.

02:23:42 19 So we took a little lunch break to see. The parties
02:23:48 20 have been working hard to see if we can resolve what should be
02:23:54 21 briefed or what doesn't need to be briefed. So let me -- we
02:24:00 22 were talking about how to handle the requests to produce.

02:24:04 23 MR. EIMER: Good afternoon, your Honor. Nate Eimer.

02:24:06 24 Thank you for the chance to get something to eat. I am always
02:24:10 25 happy to go down to 2.

02:24:12 1 We, the defendants, talked among ourselves about the
02:24:16 2 dilemma of the court having to deal with seven times 92, which
02:24:20 3 seems like a big number if you multiply it out.

02:24:20 4 THE COURT: Right.

02:24:22 5 MR. EIMER: I don't think it will be 92, ultimately
02:24:24 6 anyway, but in any event, we had a proposal that we have given
02:24:28 7 to Mr. Mogin and Mr. Freed which I think should alleviate a
02:24:32 8 lot of the burden and make this a lot easier to do.

02:24:34 9 Since IP has been the one that has already produced
02:24:38 10 the now infamous chart about a month ago --

02:24:40 11 THE COURT: Right.

02:24:40 12 MR. EIMER: -- and has already said it was willing
02:24:42 13 within a week to convert that chart into a revised objections
02:24:48 14 to the RFPs, we suggest that IP be the model for a motion to
02:24:54 15 compel against IP with respect to the 92 requests for whatever
02:24:58 16 they think is objectionable. In that way, the court will have
02:25:04 17 only to resolve the RFPs against IP at this point.

02:25:08 18 I think your Honor's ruling, to the extent that you
02:25:12 19 need to rule on anything, and hopefully there wouldn't be a
02:25:14 20 need, but after we produce the chart in the form that they
02:25:18 21 want. But to the extent we do produce, there is a motion to
02:25:22 22 compel, and your Honor does have a ruling, I think the other
02:25:24 23 defendants I think then will know exactly what we need to do,
02:25:26 24 and we can be guided with that ruling without you having to do
02:25:30 25 it seven times over.

02:25:30 1 THE COURT: Okay.

02:25:32 2 MR. EIMER: To the extent there are variations
02:25:34 3 between our responses and theirs, I think they can be guided
02:25:38 4 as to how you dealt with ours, or at least there will be some
02:25:42 5 limited number of additional issues that can be submitted
02:25:44 6 probably to a different judge, but I think your Honor won't
02:25:46 7 have to deal with it.

02:25:46 8 THE COURT: Okay.

02:25:48 9 MR. EIMER: So I think that makes it a lot more
02:25:50 10 doable --

02:25:50 11 THE COURT: Manageable.

02:25:52 12 MR. EIMER: -- in the time frame that we have.

02:25:54 13 THE COURT: Let's see what the plaintiffs feel about
02:25:56 14 that.

02:25:58 15 MR. RASHID: Your Honor, I hate to interrupt. I can
02:26:02 16 hear you clearly. It's hard for me to hear counsel speaking.

02:26:06 17 THE COURT: Good for telling us. Did you hear the
02:26:08 18 proposal, though?

02:26:10 19 MR. RASHID: I did. At points it cut out, but I
02:26:12 20 understood the general --

02:26:14 21 THE COURT: You don't have to do any work. That's
02:26:14 22 the most important thing is that Mr. Neuwirth did not get on
02:26:20 23 the plane and we dump everything on him because he wasn't
02:26:24 24 here. Okay?

02:26:24 25 MR. RASHID: Okay.

02:26:26 1 THE COURT: Now we are going to hear what Mr. Mogin
02:26:28 2 thinks for the plaintiffs about this test case.

02:26:32 3 MR. MOGIN: Well, your Honor, we don't think it would
02:26:36 4 be a very representative test case. There is a reason that IP
02:26:38 5 has been as transparent as it has, and that's because IP is
02:26:44 6 one of the least -- no. IP is not as egregious in our view as
02:26:50 7 the others with respect to this parsing issue.

02:26:52 8 We also think it would be more efficient to do this,
02:26:56 9 this particular task, perhaps the rules can be better guidance
02:27:02 10 than for some of our other tasks. And what the defendants
02:27:06 11 should do is they should file formal responses that
02:27:12 12 incorporate what they're actually doing so that the court
02:27:14 13 knows as to each defendant, and then if we need to make
02:27:18 14 motions to compel after that, we will make motions to compel,
02:27:24 15 we will do it rather quickly, and we will do it against those
02:27:28 16 defendants that we need to.

02:27:30 17 So it may be, for example, and I am just pulling
02:27:34 18 numbers out of a hat here, suppose that IP has done a pretty
02:27:36 19 good job on No. 5 but that GP hasn't. When IP has done a
02:27:44 20 pretty bad job on No. 7 and GP has done a pretty good job, the
02:27:48 21 exemplars won't guide you in any particular way in that
02:27:52 22 respect. So we think it would be more efficient to have the
02:27:56 23 defendants do what it is that we are talking about.

02:27:58 24 THE COURT: So when you say a formal response that
02:28:04 25 you want each one to do, do you want them to do Mr. McKeown's

02:28:08 1 chart? Is that what a formal response is?

02:28:12 2 MR. MOGIN: As a revised 30(b) -- Rule 34(b)
02:28:18 3 response.

02:28:22 4 THE COURT: And then what do we do when I get these
02:28:24 5 six revised responses? What do I do with those?

02:28:28 6 MR. MOGIN: You don't do anything at that point. We,
02:28:30 7 plaintiffs, review them and see what's the battleground going
02:28:36 8 to be, where does the battleground need to be, what do we
02:28:40 9 actually have to fight over.

02:28:40 10 THE COURT: So they don't have to do a chart. What
02:28:44 11 you're suggesting is they're going to tell you and, if need
02:28:52 12 be, the court what, in fact, they -- this seems to be the
02:29:00 13 discussion, is it what you produced or what you searched?

02:29:04 14 MR. MOGIN: We are willing to take it one step at a
02:29:08 15 time and just focus on search for the time being, so it would
02:29:12 16 be precisely what IP did as a formal response.

02:29:18 17 THE COURT: Did you guys talk about that at lunch?

02:29:20 18 MR. EIMER: We did not because the defendants hadn't
02:29:26 19 heard from Mr. Mogin that that would be acceptable, and I also
02:29:28 20 think it will slow the process down.

02:29:30 21 I think it will be very instructive if Mr. Mogin
02:29:34 22 concludes that the response that IP gave to request 5, for
02:29:38 23 instance, was adequate. I think that would be a substantial
02:29:42 24 guide to the other defendants as to what they should do. And
02:29:44 25 if he concludes that the response we gave to request 7 was

02:29:48 1 inadequate and he moves against it, your Honor's ruling will
02:29:52 2 be instructive to the others. So I continue to think that in
02:29:56 3 the interest of efficiency for the court --

02:29:58 4 THE COURT: Right.

02:29:58 5 MR. EIMER: -- and moving this thing along in the
02:30:02 6 time frame we have, picking one of us, and we have never been
02:30:04 7 praised for doing anything until today, and I am glad we are
02:30:08 8 now becoming model citizens along with Mr. McCareins. Maybe
02:30:12 9 not quite the status he is. He got an A plus, I think. But
02:30:16 10 now that -- you know, I think there are obvious deficiencies
02:30:20 11 that he is seemingly aware of. I think bringing those before
02:30:22 12 the court and getting them resolved, along with the things
02:30:26 13 that he has overlooked and things that are satisfactory is a
02:30:28 14 substantial movement forward so that people have some sense of
02:30:30 15 where they stand.

02:30:30 16 MR. MOGIN: Your Honor, in point in fact, this piece
02:30:36 17 of discussion was really the last thing that should be on the
02:30:40 18 agenda, as Mr. Freed said when he made his remarks. What we
02:30:46 19 are talking about now are really individualized issues as
02:30:50 20 opposed to the common issues that we set out back in August to
02:30:54 21 try to resolve, the common issues being time period, sources,
02:30:58 22 search method, and organization, whether you call that
02:31:04 23 indexing or something else.

02:31:08 24 And what I had attempted to do when we were having
02:31:12 25 the discussion earlier was to see if there wasn't a method

02:31:14 1 that we could resolve the parsing issue and the indexing issue
02:31:20 2 at once. Apparently, that's not going to be feasible.

02:31:24 3 But, in any event, I do think that all of the
02:31:26 4 defendants have an obligation under Rule 34 to do what we are
02:31:32 5 asking anyway. And as you previously noted, your Honor,
02:31:34 6 that's what's really going to narrow the scope of the issues
02:31:38 7 for you.

02:31:40 8 MR. EIMER: We are not suggesting that the other
02:31:40 9 issues don't get addressed when we're asked how we're going
02:31:42 10 to --

02:31:42 11 THE COURT: Right, timing-wise. Yours is kind of a
02:31:44 12 timing --

02:31:46 13 MR. EIMER: Well, we would do the others at the same
02:31:48 14 time as well. Your Honor asked about the RFPs, and I am
02:31:50 15 suggesting that the RFPs can be dealt with efficiently now by
02:31:56 16 just teeing up IP and just have us do it, I think we should
02:31:56 17 get to the time period under the same schedule. I think we
02:31:58 18 should get to all of the issues that everyone wants to resolve
02:32:02 19 under essentially the same schedule.

02:32:04 20 The only thing that I think is a little bit different
02:32:06 21 is the methodology issue. If the plaintiffs are still
02:32:10 22 insisting on a hearing or if your Honor thinks we need a
02:32:12 23 hearing or to continue the hearing, then I think we need to
02:32:16 24 find a hearing date within the schedule. But everything else
02:32:18 25 --

02:32:18 1 THE COURT: All right. So I understand the request
02:32:22 2 to produce issue, so let's talk about the other issue. I
02:32:24 3 mean, I do agree, let's talk about the other issue.

02:32:28 4 So what else do you think is teed up for briefing?

02:32:32 5 MR. EIMER: I think the number of the custodians, who
02:32:38 6 were the appropriate custodians. We have been going back and
02:32:42 7 forth. I think the plaintiffs should make a selection. We
02:32:44 8 have given them -- as your Honor has done, we have given them
02:32:46 9 a lot of information through the hold order list --

02:32:50 10 THE COURT: Is this search, or is this custodian? I
02:32:54 11 mean, what's our broad topic here?

02:32:56 12 MR. EIMER: I think the topic is what custodians need
02:33:02 13 to be searched, so that's the question that the plaintiffs
02:33:04 14 keep raising. I think we all have varying numbers of people
02:33:08 15 that we have searched. I think that is individualized by
02:33:12 16 defendant. I think they should go through each defendant and
02:33:14 17 notify the defendant what custodians they believe should be
02:33:18 18 searched, and we can either agree to add those additional
02:33:20 19 custodians or not; or by title, we talked about doing it by
02:33:24 20 title, for instance, if they want to do that since they have
02:33:26 21 titles of people.

02:33:28 22 And then if we disagree about adding custodians, they
02:33:30 23 can file a motion to compel that these additional people need
02:33:32 24 to be added. I think we are ready to do that.

02:33:36 25 THE COURT: Have you discussed that at lunch?

02:33:38 1 MR. EIMER: We did a bit.

02:33:40 2 THE COURT: You did.

02:33:40 3 MR. MOGIN: No, we had discussed it before lunch, but
02:33:42 4 we had discussed it for sure. And I think that as a proposal,
02:33:46 5 since it's without prejudice to our position to assert other
02:33:50 6 people, I'm not disturbed by it, but to the extent that our
02:33:56 7 judgment about who should be additional custodians is informed
02:34:00 8 by who is on the lit hold and who is within an organizational
02:34:02 9 chart. And to the extent that those are still issues, which
02:34:08 10 we are trying to resolve, once those are behind us, I am
02:34:12 11 amenable to that.

02:34:14 12 MR. EIMER: I think we've solved the issue of the lit
02:34:16 13 hold. I think there was some discussion.

02:34:16 14 MR. MOGIN: Well --

02:34:16 15 MR. EIMER: -- and I think that he will now have
02:34:18 16 access to the lit holds from all of the defendants along with
02:34:22 17 the titles of the people on the lit hold.

02:34:24 18 MR. MOGIN: I could be mistaken. I think some of my
02:34:26 19 colleagues who have responsibility for individual defendants
02:34:28 20 are also going on ongoing discussions about organizational
02:34:34 21 charts.

02:34:36 22 MR. MAROVITZ: Temple-Inland is in a different
02:34:38 23 position on the lit hold, so I want the record to be clear --

02:34:42 24 MR. EIMER: Only because they sent it to everybody in
02:34:44 25 the company.

02:34:48 1 MR. MAROVITZ: We have talked about this before,
02:34:50 2 Judge.

02:34:50 3 MR. RASHID: Your Honor, sorry to interrupt again.
02:34:50 4 This is Mr. Rashid from Quinn Emanuel. If defense counsel
02:34:56 5 could just speak up a little bit more. I can hear your Honor
02:34:58 6 perfectly well, I can hear Mr. Mogin and plaintiffs' counsel
02:35:02 7 perfectly well, but I am still having trouble picking up.

02:35:04 8 THE COURT: Okay. Thank you for letting us know
02:35:08 9 that.

02:35:08 10 MR. FREED: So I think the suggestion is okay --
02:35:10 11 Michael Freed. I think the suggestion is okay, but I think we
02:35:12 12 need to sort of get all of the available source material we
02:35:14 13 can before we make that suggestion as to additional
02:35:18 14 custodians.

02:35:20 15 MR. EIMER: We agree with that.

02:35:22 16 THE COURT: That's too early. That doesn't -- who is
02:35:28 17 this? Who just joined the conference?

02:35:34 18 MS. McLEMORE: Judge, it's Mary McLemore from
02:35:36 19 Georgia-Pacific.

02:35:36 20 THE COURT: Oh, hi, Ms. McLemore.

02:35:36 21 MS. McLEMORE: Hello.

02:35:38 22 THE COURT: Are you at the airport?

02:35:40 23 MS. McLEMORE: I am at the airport, and I missed the
02:35:44 24 early flight, so I am now waiting for the next one.

02:35:46 25 THE COURT: That's good for us. You can join us.

02:35:48 1 Good. There is a gentleman, Mr. Rashid is on the phone also.

02:35:54 2 MS. McLEMORE: Okay. Thank you. I am going to put
02:35:58 3 you guys on mute so you don't have to hear the background
02:36:02 4 noise.

02:36:02 5 THE COURT: We will go back in a minute. We have
02:36:04 6 done two different proposals on the request to produce. We
02:36:08 7 will circle back to that. We will let you know that in a
02:36:10 8 minute. No decision was made.

02:36:12 9 Now we are talking about what the second issue is,
02:36:16 10 and it was -- Mr. Eimer began by saying what custodians have
02:36:24 11 to be searched, and now we are hearing from Mr. Freed whether
02:36:30 12 this issue is actually revved up to go now or we need to do
02:36:32 13 this a couple months from now. Am I right, Mr. Freed?

02:36:38 14 MR. FREED: You are, your Honor. I would say it's
02:36:40 15 right in between. We should be able to tee it up or reach
02:36:42 16 resolution faster than a couple of months, but it's not quite
02:36:46 17 ready yet.

02:36:46 18 MR. EIMER: I think this should be within the time
02:36:48 19 frame that your Honor is here. I don't see us needing any
02:36:52 20 more time than that.

02:36:52 21 THE COURT: Tell me what the plaintiffs want to do,
02:36:54 22 tell me what you need to do in order so that you can say, Here
02:36:58 23 is what we need.

02:36:58 24 MR. FREED: Just resolve any outstanding issues about
02:37:02 25 organizational chart production because some defendants say

02:37:04 1 they don't have organizational charts so we are getting the
02:37:08 2 information in a different way. Some say that they have given
02:37:12 3 us organizational charts, and they are probably right, but
02:37:14 4 because of this problem we were having about what they
02:37:18 5 objected but produced, so we just need to get to all the
02:37:20 6 source material. Once we have done that, we will do what he
02:37:24 7 suggests, give him the names of some additional custodians.
02:37:28 8 And we did that recently with Mr. Hannan. We worked that out
02:37:32 9 in court that way.

02:37:34 10 THE COURT: So the way this motion would go, you
02:37:38 11 would make a demand on each of the defendants, if need be.

02:37:42 12 MR. FREED: Yes.

02:37:42 13 THE COURT: And say, Mr. Eimer, here are the 20 more
02:37:48 14 custodians. Mr. Eimer might say, Here you go.

02:37:52 15 MR. FREED: Yeah.

02:37:52 16 THE COURT: Or he may say, I'm giving you five, I'm
02:37:54 17 not giving you 15.

02:37:56 18 MR. FREED: Precisely. And we will get to that
02:38:00 19 pretty soon.

02:38:02 20 THE COURT: That's fine, and then we can put
02:38:04 21 something in place. But that's a good head's up for us that
02:38:06 22 that may be coming.

02:38:08 23 MR. EIMER: Right.

02:38:08 24 THE COURT: Next issue?

02:38:08 25 MR. EIMER: I think we should set a schedule for that

02:38:12 1 so we can keep it within your Honor's time frame. And I don't
02:38:16 2 think either of us disagree about having a schedule. We may
02:38:18 3 not agree on what it is, but I think we both agree that this
02:38:22 4 can be done in the near term.

02:38:22 5 THE COURT: Well, I think part of it is, I mean, the
02:38:24 6 opening -- I know how to set the schedule. I can set the
02:38:28 7 schedule, but I don't know when the plaintiffs will know
02:38:32 8 because they're still -- how many more -- I mean, what time do
02:38:36 9 you think you need in order to do this?

02:38:38 10 MR. EISNER: If we could hammer out the issue of the
02:38:50 11 litigation holds in the beginning of next week, hopefully.

02:38:50 12 MR. EIMER: Right.

02:38:52 13 MR. EISNER: So two weeks.

02:38:54 14 MR. EIMER: So two weeks, they will have the demand
02:38:56 15 to us.

02:38:56 16 THE COURT: Fourteen days. So, Chris, 14 days from
02:39:00 17 today, plaintiffs' demand -- not demand, but list of
02:39:12 18 additional custodians.

02:39:12 19 MR. EIMER: Then we'd like a week to respond and then
02:39:16 20 they can file their motion.

02:39:16 21 THE COURT: What would the week be, Chris?

02:39:22 22 MR. CAMPBELL: August 3rd.

02:39:36 23 THE COURT: And defendants one week to respond, and
02:39:40 24 then defendants are going to file --

02:39:44 25 MR. EIMER: Plaintiffs would file a motion to compel,

02:39:46 1 and I think Mr. Freed and I just discussed August 10th for his
02:39:50 2 motion.

02:39:50 3 THE COURT: Okay. And one week for your response,
02:39:52 4 how about that?

02:39:54 5 MR. EIMER: That's fine.

02:39:54 6 THE COURT: 8/17. Okay.

02:39:58 7 And if somebody says, Let's do it without replies
02:40:02 8 unless something is so outrageous that you need to file a
02:40:06 9 reply.

02:40:06 10 MR. EIMER: We'd like to cut the number down.

02:40:10 11 MR. FREED: I would say on this issue, I don't think
02:40:10 12 a reply --

02:40:12 13 THE COURT: I don't think so either. This is very
02:40:14 14 doable. This gives us 30 days. So that's good. I like that.

02:40:20 15 MR. EIMER: The other issue that I think we both
02:40:22 16 agree needs to be teed up is the time period.

02:40:24 17 THE COURT: Yes. Now, here's what -- okay. I have
02:40:30 18 been faking it out here on the time period. Are we talking
02:40:34 19 about -- I was under the impression that the dispute was --
02:40:44 20 there was a dispute -- this comes up in the requests to
02:40:48 21 produce. The plaintiffs for certain data want to go back to
02:40:54 22 2000, right?

02:40:56 23 MR. EIMER: Right.

02:40:56 24 THE COURT: Is that transactional data, or is that --
02:41:00 25 what is it?

02:41:00 1 MR. McKEOWN: Your Honor, I believe that the -- back
02:41:06 2 to 2000, the issue there is for the transactional data as
02:41:08 3 distinguished from the conduct where the plaintiffs would like
02:41:12 4 us to go back to January 1st, 2003, and the defendants have
02:41:16 5 already agreed to go back to January 1, 2004.

02:41:20 6 MR. MOGIN: The original request, your Honor, was for
02:41:24 7 January 1, 2002, so the 2003 was an accommodation.

02:41:28 8 THE COURT: Okay. Do you both agree transactional to
02:41:32 9 2000?

02:41:34 10 MR. McKEOWN: I don't believe so. I think that's
02:41:34 11 still an issue as well.

02:41:36 12 THE COURT: Okay.

02:41:38 13 MR. FREED: On that, your Honor, we can file --
02:41:40 14 because some of these were briefed all the way back to Judge
02:41:44 15 Shadur.

02:41:44 16 THE COURT: Right.

02:41:44 17 MR. FREED: Or at least partially briefed.

02:41:46 18 THE COURT: Right.

02:41:46 19 MR. FREED: So on this one, we can certainly get a
02:41:50 20 brief on file if the court sets a briefing schedule within two
02:41:54 21 weeks.

02:41:54 22 THE COURT: Good. All right. Two weeks from today.

02:41:56 23 MR. CAMPBELL: That's the 27th.

02:41:58 24 THE COURT: 27th. Okay.

02:42:00 25 Are you fellows -- or ladies and gentlemen, are you

02:42:04 1 going to file one brief with individual sections? Are you
02:42:10 2 filing -- have you talked about that? Are you filing seven
02:42:16 3 separate on something like this issue? Not on all issues.

02:42:22 4 MR. EIMER: I think we would try to consolidate it,
02:42:26 5 but there may be individual issues as we address it, and we
02:42:28 6 will have to deal with that in a separate section within the
02:42:30 7 same brief, if we could.

02:42:32 8 THE COURT: Don't you think that might be easier?

02:42:34 9 MR. EIMER: Yes.

02:42:34 10 THE COURT: And just each put your -- and then they
02:42:36 11 can deal with all -- then they'd have all seven together.

02:42:40 12 MR. FREED: So on this one, we would want a reply
02:42:42 13 because of that.

02:42:44 14 THE COURT: Yes, I agree. I agree.

02:42:50 15 I want to say this in general because I haven't -- if
02:42:56 16 burdensomeness and cost is a real issue, which I know you
02:43:02 17 would only raise it if it is, or on this if it's active or
02:43:06 18 inactive or whatever the heck it might be, you have to give
02:43:12 19 specific -- I am very strict on burdensomeness. If you are
02:43:18 20 going to allege burdensomeness, I need to know what that
02:43:22 21 means. Okay?

02:43:22 22 MR. EIMER: Fair enough.

02:43:24 23 THE COURT: Very concrete.

02:43:26 24 MR. EIMER: Thank you. Could we have two weeks to
02:43:28 25 respond to that?

02:43:28 1 THE COURT: So you are going to take two weeks to do
02:43:30 2 it? Okay.

02:43:32 3 Chris, what was the date on the plaintiffs' brief on
02:43:34 4 timing?

02:43:36 5 MR. CAMPBELL: Plaintiffs' motion 7/27.

02:43:38 6 THE COURT: And defendants'?

02:43:40 7 MR. CAMPBELL: That would be August 10th.

02:43:42 8 THE COURT: August 10th.

02:43:44 9 MR. MOGIN: Your Honor, if defendants are going to be
02:43:46 10 putting in detailed information about burden, we will
02:43:48 11 obviously need a reply.

02:43:48 12 THE COURT: You will.

02:43:50 13 MR. MOGIN: And we may -- I hate to use the D word,
02:43:52 14 but...

02:43:54 15 THE COURT: What?

02:43:54 16 MR. MOGIN: Some form of discovery verification of
02:43:58 17 whatever facts they put in might be required. I don't know
02:44:00 18 what they are going to put in at this point.

02:44:04 19 MR. EIMER: Why don't we address that if need be
02:44:06 20 later?

02:44:06 21 THE COURT: I have burden all the time. I mean,
02:44:08 22 that's why I want it completed. Sometimes people put
02:44:16 23 affidavits in. You can throw somebody's case out on an
02:44:18 24 affidavit, you should certainly be able to do other things on
02:44:22 25 an affidavit.

02:44:22 1 If it isn't, we will deal with it when we get to it.

02:44:24 2 Okay?

02:44:24 3 MR. EIMER: Fair enough.

02:44:26 4 THE COURT: Two weeks? Do you want two weeks to

02:44:28 5 reply?

02:44:28 6 MR. FREED: Yes.

02:44:28 7 THE COURT: That's fine. That's fine.

02:44:32 8 August what?

02:44:34 9 MR. CAMPBELL: 24.

02:44:34 10 THE COURT: August 24th. You got it.

02:44:36 11 Telephone, can you hear me on these dates? Chris is

02:44:40 12 going to do a written order too. Okay.

02:44:46 13 MR. RASHID: I got it.

02:44:48 14 THE COURT: Feel free to pipe up if you need any

02:44:50 15 clarification. Okay?

02:44:52 16 MR. RASHID: Thank you, your Honor.

02:44:52 17 THE COURT: Good. Two issues.

02:44:54 18 MR. EIMER: We're rolling.

02:44:56 19 THE COURT: We are on a roll. Keep going, Mr. Eimer.

02:44:58 20 MR. EIMER: I think we just agreed to the next one.

02:45:00 21 We have different names for it, but I hope that -- I call it

02:45:02 22 backup tapes and other electronic media, Mr. Freed calls it

02:45:04 23 data sources, I think; but the idea is we need to search

02:45:08 24 backup tapes and other electronic media that are, we think,

02:45:14 25 inaccessible or not readily accessible.

02:45:16 1 THE COURT: On this one. Okay. Now, are you really
02:45:26 2 ready to do this? I mean, this is your burden on this one,
02:45:34 3 the plaintiffs' burden, if they are.

02:45:36 4 Now, other media, I don't think this should come in
02:45:38 5 the same motion.

02:45:42 6 MR. EIMER: Well, I agree with you.

02:45:42 7 THE COURT: Because not readily accessible is their
02:45:48 8 burden.

02:45:50 9 MR. EIMER: Right. And to me, it's only not readily
02:45:52 10 accessible. That's the issue here.

02:45:54 11 So I called it backup tapes, he had it other sources,
02:45:56 12 but to me it's the backup tape issue.

02:45:58 13 MR. MOGIN: I'm sorry, your Honor. Isn't it their
02:46:02 14 burden to establish that something isn't readily accessible?

02:46:04 15 THE COURT: No. It's yours to show -- I mean, that's
02:46:06 16 what I believe is. If you make a request upon them and they
02:46:12 17 say it's on a backup tape -- now, people call this different
02:46:16 18 things. You know, is it archived, is it whatever. Then the
02:46:20 19 burden is on you, the burden is on the moving party I believe
02:46:28 20 clearly under the rule to establish your need for it, that
02:46:34 21 there isn't anyplace else you could get it.

02:46:38 22 The only reason I am saying that -- I am not making
02:46:42 23 any NRA ruling, is do you have enough information right now to
02:46:44 24 make that request is what I am saying.

02:46:48 25 MR. MOGIN: I think I misunderstood what you were

02:46:50 1 saying. It's their burden to demonstrate that something is
02:46:52 2 not readily accessible. It's our burden to demonstrate some
02:46:56 3 form of need. I think that's what you just said.

02:46:58 4 THE COURT: Well, it's need and all the other
02:47:02 5 factors. I mean, all they have to do is say it's on a backup
02:47:06 6 tape. I mean, they say -- if they were to say, All of our
02:47:12 7 material from 2000 is on backup tape. I don't know how this
02:47:18 8 is going to come up. It usually comes up in specific context.
02:47:22 9 I mean, it's not -- I mean, Mr. McKeown, have you ever seen
02:47:26 10 this like theoretically come up?

02:47:28 11 MR. McKEOWN: I am not sure that I have, your Honor.

02:47:30 12 THE COURT: I mean, it usually comes up in a -- we
02:47:38 13 want the dates to go back to 2000, and each of you have got
02:47:42 14 different systems on what's on active data and what's on
02:47:48 15 backup data.

02:47:48 16 MR. EIMER: Right.

02:47:50 17 THE COURT. So that's why their responses may be
02:47:52 18 different on the timing.

02:47:56 19 MR. McKEOWN: It is related, your Honor, to the
02:47:58 20 question earlier on the timing scope, as you were saying. But
02:48:00 21 to the extent both are custodians --

02:48:02 22 THE COURT: And correct me -- you are not going to
02:48:04 23 insult me. Correct me if I'm wrong. I think once you say
02:48:06 24 it's on the backup tapes, then it's on them to show it is then
02:48:12 25 -- it is their burden. I will pull it off the rule.

02:48:16 1 MR. EIMER: We agree.

02:48:16 2 THE COURT: It's your burden to show why you need it,
02:48:20 3 why you can't get it anywhere else. Charles is going to help
02:48:28 4 us out.

02:48:28 5 MR. GOODWIN: I just have the text of the rule of --

02:48:32 6 THE COURT: Okay. Good. Read it to us.

02:48:34 7 MR. MOGIN: A party may not provide discovery of
02:48:38 8 electronically-stored information from sources that the party
02:48:40 9 identifies is not reasonably accessible because of undue
02:48:42 10 burden or cost.

02:48:44 11 THE COURT: Okay.

02:48:46 12 MR. MOGIN: On a motion to compel discovery or for a
02:48:48 13 protective order, the party from whom discovery is sought must
02:48:52 14 show that the information is not reasonably accessible because
02:48:56 15 of undue burden or cost. If that showing is made, the court
02:49:00 16 may nonetheless order discovery from such sources if the
02:49:02 17 requesting party shows good cause, considering the limitations
02:49:06 18 of Rule 26(b)(2)(c), the court may specify conditions for
02:49:12 19 discovery.

02:49:14 20 And just so that it's clear, I was reading from Rule
02:49:30 21 26(b)(2)(b), specific limitations on electronically-stored
02:49:32 22 information

02:49:34 23 THE COURT: And this is the first time we have come
02:49:34 24 up with the not reasonably accessible. We haven't had this
02:49:40 25 issue in the case.

02:49:40 1 MR. EIMER: Right.

02:49:42 2 THE COURT: So I am glad it came up because this
02:49:46 3 is -- now, here's a real meet and confer. I mean, before you
02:49:52 4 start down the road on time scope, you need a quick meet and
02:49:56 5 confer because if this is all on backup tapes or something,
02:49:58 6 you don't want to be briefing the whole darn issue until you
02:50:04 7 first talk about what's there.

02:50:08 8 MR. EIMER: Right. I think --

02:50:10 9 THE COURT: I think you've got time to do that in
02:50:14 10 between here.

02:50:14 11 MR. EIMER: Well, they have had some discovery
02:50:16 12 already of our systems through the 30(b)(6) and the letters
02:50:20 13 that were written.

02:50:20 14 THE COURT: That's true.

02:50:22 15 MR. EIMER: They are a long way into our systems
02:50:24 16 already. They understand our systems. I think there was some
02:50:26 17 discussion whether we would produce additional transactions,
02:50:30 18 anything that were still ongoing. What I suggest, your Honor,
02:50:30 19 is we go into the same briefing schedule we had for time
02:50:34 20 period, which puts the plaintiffs two weeks out.

02:50:36 21 THE COURT: Okay.

02:50:36 22 MR. EIMER: If there's some discussion we can have in
02:50:38 23 that period, we would be glad to resolve as much as we can.

02:50:42 24 MR. FREED: I would only ask on this one that we be
02:50:46 25 given an extra week on the reply because it's they come up

02:50:50 1 with the detailed -- we have already again briefed this --

02:50:52 2 THE COURT: You say same briefing schedule.

02:50:54 3 MR. FREED: Two, two, three.

02:50:58 4 THE COURT: Two, two -- three?

02:50:58 5 MR. FREED: Yes, because on this one, we are going to
02:51:00 6 be responding perhaps to seven different positions.

02:51:06 7 THE COURT: You may not. It may not even be
02:51:10 8 unreasonably accessible.

02:51:12 9 MR. FREED: You're right.

02:51:12 10 THE COURT: But this is going to flesh out what's on
02:51:14 11 backup tapes.

02:51:14 12 MR. FREED: Yes.

02:51:16 13 THE COURT: This is going flesh out the overarching
02:51:20 14 issue of what's on backup tapes.

02:51:22 15 MR. MOGIN: May I make a suggestion, please, your
02:51:24 16 Honor?

02:51:24 17 THE COURT: Yes.

02:51:24 18 MR. MOGIN: With respect to this motion, after the
02:51:26 19 defendants file their response, perhaps before the plaintiffs
02:51:30 20 charge off and do a reply, we should have a conference with
02:51:32 21 the court.

02:51:34 22 THE COURT: I think so too. I think this would be a
02:51:36 23 great one to have a conference on.

02:51:38 24 MR. EIMER: That's fine.

02:51:38 25 MR. MOGIN: It may prove to be, your Honor, that we

02:51:40 1 are incapable of litigating the motion until defendants have,
02:51:44 2 in fact, pleaded their productions, and that's an issue that
02:51:48 3 we won't know until they file it.

02:51:50 4 THE COURT: And we see what the heck it is, whether
02:51:52 5 it's worth it or not.

02:51:54 6 MR. EIMER: I think we should keep the briefing
02:51:54 7 schedule in place.

02:51:56 8 THE COURT: Yes.

02:51:56 9 MR. EIMER: But having a conference --

02:51:58 10 THE COURT: I want to have a conference in between
02:52:00 11 here anyway.

02:52:02 12 Chris, what's our dates on this one?

02:52:08 13 MR. CAMPBELL: Plaintiffs' motion is July 27th.
02:52:10 14 Response is August 10th.

02:52:12 15 THE COURT: Mr. Mogin was saying after the response.

02:52:20 16 MR. MOGIN: But then I have my 12th through 24th time
02:52:24 17 period.

02:52:24 18 THE COURT: All right. But that's okay. We can hold
02:52:26 19 off -- we could just hold off on the reply until after the
02:52:30 20 conference. Okay. I think that's a good idea.

02:52:36 21 Let's just keep going with these issues. I don't
02:52:38 22 want to get off these issues.

02:52:42 23 MR. EIMER: Your Honor, Mr. Marovitz, in the interest
02:52:44 24 of efficiency and reducing a lot of paper we submit, was
02:52:46 25 wondering whether when we respond on the 10th, could we submit

02:52:48 1 a consolidated paper with the time period brief and the
02:52:48 2 backup --

02:52:52 3 MR. MAROVITZ: If it's efficient. If it makes sense.

02:52:56 4 MR. EIMER: I haven't thought about this brief,
02:52:56 5 but --

02:52:58 6 MR. MAROVITZ: There are some relationships between
02:52:58 7 the two issues, so it may be most efficient for us just to put
02:53:02 8 them all together. It may not be.

02:53:06 9 THE COURT: Well, we were looking -- Chris came from
02:53:08 10 Mr. Mogin's neck of the woods, so when we thought we were
02:53:12 11 going to have this horrendous request to produce in -- the
02:53:16 12 Central District of California has this consolidated way they
02:53:18 13 do motions where parties -- a court gets one document, and
02:53:26 14 that even has plaintiff and then defendants' response.

02:53:32 15 And so we were -- so we are kind of -- we are not
02:53:34 16 doing that because, fortunately, you saved me from 600-plus
02:53:40 17 requests to produce at the moment.

02:53:42 18 But, yes, so you can experiment with that, whatever
02:53:48 19 is kind of working for you, cutting down extra repetition.

02:53:54 20 MR. EIMER: Exactly.

02:53:54 21 THE COURT: If you want to do one on the law, if
02:53:58 22 somebody would take the law and say, Here's the law we're
02:54:02 23 relying on, that will help all of us.

02:54:04 24 MR. EIMER: Okay.

02:54:04 25 THE COURT: And if you can't, in fairness to your

02:54:06 1 client, then you have my permission to file a separate one.

02:54:10 2 Okay?

02:54:10 3 MR. EIMER: We are going to try to put it together as
02:54:12 4 much as we can.

02:54:12 5 THE COURT: Do you guys have any problem with that,
02:54:14 6 if they try to consolidate it?

02:54:16 7 MR. FREED: No, no, if it turns into a consolidated
02:54:20 8 brief of 60 pages, and I don't know if it will won't, we might
02:54:26 9 ask for --

02:54:26 10 THE COURT: You don't have to worry. That's not an
02:54:28 11 issue.

02:54:28 12 MR. EIMER: It's not to increase our page limit.

02:54:30 13 THE COURT: Right, but it just might be easier.

02:54:32 14 MR. EIMER: Right.

02:54:34 15 Then the next issue we had was the indexing issue, to
02:54:36 16 see whether we are required to index the documents that we
02:54:40 17 actually produce and trace them back to the request.

02:54:46 18 THE COURT: Now, they have quite a motion. They have
02:54:48 19 a motion I looked at not too long ago. Isn't that one
02:54:50 20 pending?

02:54:52 21 MR. EIMER: I don't think so?

02:54:56 22 MR. CAMPBELL: No.

02:54:56 23 THE COURT: It was in the status report.

02:54:58 24 MR. EIMER: It was in the status report.

02:55:00 25 THE COURT: It was in the status report to Judge

02:55:02 1 Shadur.

02:55:02 2 MR. EIMER: So I think they should formalize it now
02:55:06 3 into a motion. I am glad to do it under the same briefing
02:55:08 4 schedule we have for time period.

02:55:08 5 MR. MOGIN: We'd like to see the revised Rule 34
02:55:14 6 responses before we know whether we have to go to that next
02:55:16 7 step.

02:55:18 8 MR. EIMER: You have the IP --

02:55:20 9 THE COURT: I haven't decided yet. I haven't decided
02:55:24 10 on whether we are going to start with Mr. McKeown's -- would
02:55:36 11 you need for the index -- I mean the indexing -- here's a
02:55:42 12 question I have. Indexing issue, even if each of them exactly
02:55:50 13 did Mr. McKeown's, which nobody has agreed to do, which is not
02:55:54 14 on the table at the moment, do you need indexing of Mr.
02:55:58 15 McKeown's?

02:56:00 16 MR. MOGIN: I don't know the answer to that, your
02:56:00 17 Honor.

02:56:02 18 THE COURT: Okay. So really the indexing motion,
02:56:08 19 until I decide -- I think we can't set this today. Chris can
02:56:14 20 send you a briefing -- I mean, I have to decide if plaintiffs
02:56:18 21 want me to not just do Mr. McKeown's, they want me to order
02:56:22 22 each of the defendants to submit --

02:56:32 23 MR. EIMER: I believe, your Honor, that it's
02:56:34 24 basically a legal question. If you are going to order, for
02:56:36 25 instance, IP to index its documents, I think the result is

02:56:40 1 going to be the same for everybody.

02:56:40 2 THE COURT: But they are saying they might not need
02:56:42 3 it.

02:56:44 4 MR. EIMER: That's what I am saying. If we give them
02:56:46 5 the index and that resolves the indexing issue as to IP, I
02:56:50 6 think it would resolve it to everybody if they agree to do the
02:56:52 7 same thing we do.

02:56:54 8 So if he answers that question in the affirmative,
02:56:56 9 Yes, it resolves indexing and we are done, that's fine. If it
02:57:00 10 doesn't, then let him file a motion against IP and hear legal
02:57:04 11 ruling, we will essentially decide it for everybody.

02:57:08 12 MR. MOGIN: To quote the defendants, your Honor, why
02:57:10 13 should we do this on a theoretical basis? Let's see what
02:57:12 14 actually exists.

02:57:14 15 THE COURT: No. This is -- I mean, is Mr. McKeown --
02:57:20 16 is Jim giving you anything new that he didn't give you? Are
02:57:26 17 you giving them something different than you've given them
02:57:30 18 already?

02:57:30 19 MR. McKEOWN: Well, the one item that we agreed to
02:57:32 20 earlier today, your Honor, was to take that information and
02:57:36 21 transform it into modified responses to the formal requests
02:57:40 22 and our objections.

02:57:42 23 MR. EIMER: But it's the same information.

02:57:44 24 MR. McKEOWN: It's the same information.

02:57:46 25 MR. EIMER: We are glad to do it, and we are glad to

02:57:50 1 do it in a week. It's not going to take very long.

02:57:52 2 THE COURT: Right. So you need to see it before you
02:57:54 3 can answer if you are going to still need indexing.

02:57:58 4 MR. FREED: But here is the rub. The IP reformatting
02:58:04 5 will be done, your Honor may rule, the understanding is let's
02:58:08 6 say you agree with us that there should be some further
02:58:12 7 disclosure, the others will be guided by it, but we will now
02:58:16 8 be starting off with their version, and it just seems to me
02:58:20 9 that that's really not an efficient way to do it. We should
02:58:24 10 have all the versions in front of us for one time.

02:58:28 11 MR. McKEOWN: Except that if it's going to be
02:58:30 12 efficient to do them and it's gathered by one; otherwise, what
02:58:36 13 you're suggesting is there are going to be seven different
02:58:40 14 decisions the first time. And at least I think there will be
02:58:42 15 some guidance, even if you don't think it's complete across
02:58:46 16 all defendants, to have the issue teed up first.

02:58:48 17 MR. EIMER: Well, and the plaintiffs' position was as
02:58:50 18 a matter of law under the federal rules, because we didn't
02:58:50 19 produce in the ordinary course, as they say, which we think we
02:58:54 20 did, they are entitled to an index as a matter of law under
02:58:58 21 the rules. Well, either they are or they aren't.

02:59:00 22 THE COURT: So you think it is ready.

02:59:02 23 MR. EIMER: I think it is ready. I don't see what
02:59:04 24 needs to be done. If they want our index -- our responses,
02:59:06 25 that's fine. We are glad to give them our responses. But I

02:59:10 1 would do it on the same schedule we have again for everything
02:59:12 2 else. They can file their brief on the 27th, that's two weeks
02:59:16 3 from now. They can write their brief. They have a very
02:59:20 4 simple legal motion. They have essentially keyed it up in
02:59:22 5 front of Judge Shadur. It hasn't changed.

02:59:26 6 MR. FREED: We thought we were doing --

02:59:28 7 THE COURT: I know.

02:59:28 8 MR. FREED: -- them a favor.

02:59:28 9 THE COURT: I thought so too.

02:59:30 10 MR. FREED: But if they want to do it on the basis of
02:59:36 11 the formalistic law with respect to indexing, we are prepared
02:59:40 12 to do that. We think the law is very strongly on our side on
02:59:44 13 that. We thought there might be a pragmatic way to avoid it
02:59:48 14 if we could make progress --

02:59:48 15 MR. EIMER: We tried to do that, and we were prepared
02:59:50 16 to do that. That's why we were redoing our responses. If
02:59:54 17 that satisfies, then that's fine.

02:59:56 18 THE COURT: I need to talk to Chris, frankly, on the
02:59:58 19 first issue. So we will give -- we will decide the timing of
03:00:04 20 the indexing. It's not going to be far off.

03:00:08 21 MR. FREED: That's fine.

03:00:08 22 MR. EIMER: Thank you, your Honor.

03:00:10 23 THE COURT: Indexing for us is coupled into the first
03:00:14 24 issue.

03:00:16 25 MR. EIMER: And then the last issue I have on my list

03:00:20 1 is in the scope of RFP, you and Chris are going to work on it
03:00:24 2 later and notify us, right?

03:00:26 3 THE COURT: Right, I am.

03:00:26 4 MR. EIMER: The last issue I have on my list is the
03:00:28 5 search methodology question. So is the methodology we use,
03:00:32 6 not that our search is perfect and our production is great,
03:00:36 7 but, Judge, is it reasonable -- is it a reasonable methodology
03:00:38 8 to use Boolean searches, or do we have to use concept-based
03:00:44 9 searching?

03:00:44 10 THE COURT: So you are not saying -- wait. You're
03:00:50 11 saying is the search methodology that was used in this case
03:00:54 12 reasonable?

03:00:56 13 MR. EIMER: Yes. I am not saying that the search is
03:01:00 14 perfect and that we don't have to search other places or even
03:01:04 15 that our terms are the best terms we should have used. The
03:01:08 16 search terms might be modified. We are not asking that. The
03:01:12 17 plaintiffs have said that in this case, we should use
03:01:14 18 concept-based searching. Either they withdraw that concept
03:01:18 19 and say, We will work with Boolean searching, or we'd like it
03:01:22 20 decided now that Boolean searching in this case is a
03:01:24 21 reasonable method for searching because we don't want to have
03:01:28 22 to redo this a year from now or who knows when when somebody
03:01:32 23 decides they want to raise it again.

03:01:34 24 So your Honor has already heard some testimony on
03:01:38 25 this. That may be enough for the court. Plaintiffs' counsel

03:01:40 1 seemed to say they want to take some more evidence in. We'd
03:01:44 2 like to do that and get that done.

03:01:48 3 THE COURT: Mr. Mogin, you are the one that raised
03:01:54 4 this issue, so what way do you and your fellow lawyers think
03:02:00 5 this should be teed up?

03:02:02 6 MR. MOGIN: If what the defendants are asking for,
03:02:04 7 your Honor, is some sort of finding or some sort of order that
03:02:08 8 their search was reasonable, whatever the parameters of that
03:02:14 9 are, I am a little uncertain, but whatever the parameters of
03:02:18 10 that are, you know, they're the ones that requested the
03:02:22 11 evidentiary hearing, so I don't know how we can get to that
03:02:26 12 finding without going to the trouble of completing the
03:02:30 13 evidentiary hearing. And what we will argue at the conclusion
03:02:34 14 of the evidentiary hearing that notwithstanding Sedona 6 or
03:02:38 15 other principles of that nature since that isn't exactly the
03:02:42 16 law, we would -- that this case and defendants' actual
03:02:48 17 methodology that was used is noncompliant and requires a
03:02:56 18 deviation from that principle.

03:03:00 19 MR. EIMER: We are prepared to do that. We looked at
03:03:02 20 your Honor's schedule, and we think that a hearing can be held
03:03:04 21 on September 4th. We would propose that to finish the hearing
03:03:08 22 and then a short briefing schedule.

03:03:22 23 THE COURT: Can't we take one of those August dates?

03:03:26 24 MR. EIMER: I'd like to, but I think we have problems
03:03:28 25 the witness who needs to be cross-examined.

03:03:30 1 THE COURT: Who is it, Dan Regard? He can't get
03:03:32 2 here?

03:03:32 3 MR. MAROVITZ: He is available during the weeks that
03:03:34 4 Mr. Mogin is out.

03:03:36 5 MR. EIMER: Right. There's two weeks that Mr. Mogin
03:03:38 6 is on vacation in August, assuming he wants to block those
03:03:40 7 out.

03:03:42 8 THE COURT: I am sure he does.
03:03:42 9 What about that last week in August?

03:03:52 10 MS. MILLER: He has a conflicting obligation, your
03:03:54 11 Honor.

03:03:54 12 MR. MOGIN: Your Honor, I would have to check with
03:03:58 13 Dr. Tenny.

03:03:58 14 THE COURT: I am -- this is so hard on the court
03:04:04 15 reporter, this is so hard on everybody.

03:04:06 16 MR. EIMER: Understood. We don't want to have to do
03:04:10 17 this over again.

03:04:10 18 THE COURT: No, I don't either. I don't either.
03:04:12 19 This time we are starting at 7:00 o'clock in the morning. I
03:04:16 20 mean, we are also putting time limits on people because what
03:04:20 21 happened before. And we are going to have oral argument
03:04:24 22 after, maybe no briefing, we are going to have oral argument,
03:04:28 23 and I can't do much else other than that.

03:04:32 24 MR. EIMER: Right. We are fine.

03:04:32 25 THE COURT: You can do prehearing briefing, we can --

03:04:40 1 MR. EIMER: We are glad to do prehearing briefing.

03:04:42 2 Essentially, the evidence is in, from our perspective.

03:04:44 3 THE COURT: So September 4th works with you.

03:04:46 4 Oh, you don't know when Mr. Tenny and Dr. Lewis. You
03:04:56 5 have to go call them.

03:04:56 6 MR. EIMER: If they can come in on another day in
03:04:58 7 August, we'll do it in two steps. That's fine.

03:05:00 8 THE COURT: The last week in August, we could do
03:05:02 9 Dr. Lewis and Dr. Tenny. I am willing to do that.

03:05:08 10 I don't need this in order. I really do not need it
03:05:12 11 in order.

03:05:16 12 MR. MOGIN: I agree.

03:05:16 13 THE COURT: I would like to hold this issue to the
03:05:30 14 facts of this case.

03:05:30 15 MR. MOGIN: Absolutely.

03:05:32 16 MR. EIMER: Absolutely.

03:05:32 17 THE COURT: That's what I would like to do.

03:05:34 18 MR. EIMER: Right. We don't need to satisfy the
03:05:38 19 blogosphere's desire to rule.

03:05:40 20 THE COURT: We don't.

03:05:40 21 That last week in August, Mr. Mogin, I am free
03:05:44 22 Monday, Tuesday, and Wednesday.

03:05:48 23 MR. MOGIN: I won't have much time to prepare, your
03:05:50 24 Honor, and I don't know what my witness' availability is.

03:05:56 25 MR. EIMER: The last week in August is a month and a

03:05:58 1 half from now.

03:05:58 2 THE COURT: Right. At lunch, Chris and I talked.
03:06:22 3 You know, again, I don't -- and I am not saying this
03:06:28 4 cryptically, but if courts in the building use affidavits to
03:06:30 5 throw cases out, I don't know why here we couldn't have an
03:06:36 6 affidavit from Dr. Tenny. Dr. Lewis lives right here in the
03:06:42 7 city. He is like very simple. In fact, he's come to most of
03:06:46 8 our hearings. We could have him finish up. And I know you
03:06:50 9 want to talk to Mr. Regard because you didn't ask him anything
03:06:54 10 substantive, so you need to cross-examine him on whatever
03:07:00 11 substantive part you want to talk to him about.

03:07:02 12 But we can start -- I mean, we can definitely start.
03:07:08 13 Dr. Lewis we can do any time you want. We could do Dr. Lewis
03:07:14 14 next Wednesday, if you wanted.

03:07:16 15 MR. MOGIN: If we could do this, your Honor. Perhaps
03:07:18 16 next Wednesday, we could have a brief scheduling call?

03:07:20 17 THE COURT: Sure.

03:07:22 18 MR. MOGIN: That would give me time to speak to the
03:07:24 19 witnesses.

03:07:24 20 THE COURT: Not this Wednesday. A week from
03:07:26 21 Wednesday.

03:07:26 22 MR. MOGIN: A week from Wednesday.

03:07:28 23 THE COURT: That's a good idea. And you can also
03:07:28 24 think if you literally -- if you are protecting your record,
03:07:42 25 if that's the reason you want to go through with the hearing,

03:07:48 1 if you could stipulate to some information, if you could file
03:07:52 2 affidavits, because I think the defendants say they don't want
03:07:56 3 to do this a second time, I don't want to do this a second
03:08:00 4 time. This was a specific reason Judge Shadur sent it to me
03:08:04 5 was to conduct the hearing, so I feel like, you know -- the
03:08:10 6 one part, Mr. Mogin, you know, I knew you might want to go
03:08:14 7 back to the issue. I did not think you would want to go back
03:08:18 8 to the hearing. That I would have done earlier.

03:08:20 9 MR. MOGIN: They are the ones that were asking for
03:08:22 10 the seal of approval, for lack of a better term, your Honor.

03:08:24 11 THE COURT: Are you?

03:08:26 12 MR. EIMER: No, we just don't want to have to redo
03:08:32 13 our search a year from now when Mr. Mogin raises it again. So
03:08:32 14 if he is willing to sign off on what we did in terms of using
03:08:36 15 Boolean searches, not that the search was perfect, we don't
03:08:38 16 expect him to agree on that. We just don't want to hear
03:08:40 17 anymore you should have used concept-based searching. If
03:08:42 18 that's off the table, then we don't need anything.

03:08:44 19 THE COURT: That's what I thought too, Mr. Mogin, is
03:08:48 20 -- or even if you say over your objection, I am finding -- I
03:08:54 21 mean, but -- that you cannot go back to it a year from now on
03:09:02 22 the quality of the choice, not -- you know, anybody can go
03:09:10 23 back to, Hey, we now found the smoking gun at the end of the
03:09:12 24 case, okay, whether this issue was even raised, you are not
03:09:18 25 precluded from that if something new comes up. But in your

03:09:24 1 status report yesterday, it was one of the first things was
03:09:32 2 initially, Hey, this search is a problem. And I actually feel
03:09:38 3 like I have to redeem myself too, whatever that means with
03:09:42 4 Judge Shadur since he said, You're to decide this.

03:09:46 5 MR. MOGIN: Recall, your Honor -- pun intended, I
03:09:50 6 guess -- that recall is, in fact, one of recall and
03:09:52 7 statistical validation were some of the issues that we were
03:10:00 8 discussing during the hearing. And you asked us, as I was
03:10:02 9 saying this morning, to put together something else, see if we
03:10:06 10 could do that within the Boolean construct. As we said this
03:10:10 11 morning, we never got a response on that except, We are not
03:10:12 12 interested.

03:10:14 13 THE COURT: Well, I know, but that's different than
03:10:16 14 you tugging on my robe saying, Hey, Nolan, you haven't gone
03:10:22 15 back and done the validation is different than going back and
03:10:26 16 putting Dan Regard back on the stand again.

03:10:28 17 MR. MOGIN: I am not the one who asked for the seal
03:10:30 18 of approval, your Honor. I am just saying if that's what the
03:10:34 19 defendants are asking for --

03:10:34 20 THE COURT: Are you asking for a seal of approval?

03:10:38 21 MR. McKEOWN: No, we are not asking for a seal of
03:10:40 22 approval. Our point is simply that we saw in the status
03:10:42 23 report from the plaintiff, we saw in the email yesterday the
03:10:44 24 suggestion that at some point down the road --

03:10:48 25 THE COURT: Right.

03:10:48 1 MR. McKEOWN: -- the plaintiffs may request us to go
03:10:50 2 back to predictive coding. And if that were the case, if it
03:10:54 3 we're to come up in October --

03:10:56 4 THE COURT: You'd rather have Nolan deciding that
03:11:00 5 than the new judge because I have spent -- no, because I have
03:11:02 6 spent one year intensively looking at the particular search in
03:11:08 7 this case.

03:11:10 8 MR. EIMER: Exactly.

03:11:10 9 MR. McKEOWN: And since there were witnesses at a
03:11:12 10 hearing --

03:11:14 11 THE COURT: That I have observed.

03:11:14 12 MR. McKEOWN: -- that you have observed, we might
03:11:16 13 have to go back and start from square one.

03:11:18 14 So all we really want is the plaintiffs to say they
03:11:20 15 are not going to come back and say they want content-based
03:11:24 16 analytics or predictive coding. We can talk through the
03:11:26 17 process about what's satisfactory validation --

03:11:32 18 THE COURT: I have been the one saying about
03:11:36 19 satisfactory. I know what document you are talking about that
03:11:38 20 you didn't spend a lot of time preparing, okay, and we have
03:11:42 21 never gotten to really discuss that. But if this is only
03:11:48 22 being done because we haven't gotten to the validation, I
03:11:52 23 don't know whether that really is worth having a hearing.

03:11:56 24 If you need to do this because you represent a class
03:12:00 25 and you need this issue for appeal, I am saying to you, could

03:12:04 1 you do the same thing on a stipulation or affidavit, or do you
03:12:06 2 really need the hearing. That's all I am saying to you.

03:12:08 3 MR. MOGIN: And please recall, your Honor, that this
03:12:10 4 morning you said you wouldn't put me on the spot to make a
03:12:14 5 decision about that today. So that's one thing. But with
03:12:16 6 respect --

03:12:18 7 THE COURT: So we could have this on the telephone
03:12:20 8 call.

03:12:20 9 MR. MOGIN: Yes.

03:12:20 10 THE COURT: Because you need to talk to your people
03:12:22 11 too. You need to talk to your people on when they can come.

03:12:26 12 MR. MOGIN: Exactly. With respect to the seal of
03:12:28 13 approval issue and yesterday, your Honor, it was the
03:12:32 14 defendants who submitted the proposed order --

03:12:34 15 THE COURT: It was Mr. Neuwirth's first thing. He
03:12:36 16 came out of the box, and I am -- which is the reason I said,
03:12:42 17 you know, I can write my own orders, but search methodology
03:12:46 18 was definitely --

03:12:50 19 MR. EIMER: Because we needed to take it off the
03:12:52 20 table.

03:12:52 21 THE COURT: Yes.

03:12:52 22 MR. EIMER: Could we reserve September 4th in case
03:12:56 23 Mr. Mogin still wants a hearing?

03:12:56 24 THE COURT: I think September 4th might not be a bad
03:13:00 25 day for us to do some cleanup stuff anyway.

03:13:02 1 MR. EIMER: So let's keep it --

03:13:04 2 THE COURT: Is that good?

03:13:06 3 MR. MOGIN: No, your Honor, because I don't know the
03:13:08 4 witnesses' availability.

03:13:08 5 THE COURT: No, what Mr. Eimer is saying, my schedule
03:13:12 6 fills up so much with settlement conferences, just hold until
03:13:18 7 we talk on the phone. I think what he is saying is, Hold
03:13:20 8 September 4th for me.

03:13:22 9 MR. MOGIN: All right.

03:13:22 10 THE COURT: And I am telling you so you have enough
03:13:24 11 time on your other folks, I can squeeze them in. If you
03:13:32 12 decide you want to have a hearing, we will squeeze Dr. Lewis
03:13:36 13 and we will squeeze Dr. Tenny. But you think about it.
03:13:44 14 Obviously, for all of the sparring this morning, you guys have
03:13:50 15 a nice talk to each other on the telephone.

03:13:52 16 MR. EIMER: We will.

03:13:52 17 THE COURT: What do they say? I dodged the bullet
03:14:00 18 here.

03:14:02 19 MR. EIMER: We are trying to get the bullets out of
03:14:04 20 the way.

03:14:04 21 Your Honor, when you mentioned the phone conference,
03:14:06 22 is that the 25th of July for the phone conference?

03:14:08 23 THE COURT: Yes.

03:14:10 24 MR. EIMER: What time?

03:14:12 25 THE COURT: I happen to have no conference that day.

03:14:14 1 Talk to your peeps. Turn around, talk to your peeps.

03:14:22 2 Not 9:00 o'clock because I have court at 9:00

03:14:24 3 o'clock.

03:14:30 4 Morning or afternoon.

03:14:30 5 MR. EIMER: I think morning is better.

03:14:32 6 THE COURT: 11:00 o'clock?

03:14:36 7 MR. EIMER: That'd be fine.

03:14:36 8 MS. MILLER: 10:00.

03:14:38 9 THE COURT: 10:00? 10:00 Chicago time, but that

03:14:42 10 gives Mr. Mogin --

03:14:42 11 MS. MILLER: 10:30?

03:14:42 12 THE COURT: 10:30. How about 10:30?

03:14:46 13 MR. RASHID: I'm sorry, what was the time, your

03:14:46 14 Honor?

03:14:46 15 THE COURT: 10:30 Chicago time.

03:14:50 16 Most people can even step out if you're someplace and

03:14:54 17 need to -- you know, we are going to do it in the courtroom,

03:14:56 18 we will be on the record, and, hopefully, somebody will let me

03:15:06 19 know -- let Chris and I know if you have any agreements

03:15:06 20 beforehand.

03:15:06 21 Ms. Miller, will you set the number up for us?

03:15:06 22 MS. MILLER: Yes.

03:15:10 23 THE COURT: She will send us an email with the

03:15:12 24 number. And if you kind of have a little semi bit of an

03:15:16 25 agenda too on what we are talking about, that will help.

03:15:20 1 MR. EIMER: We will do that. Thank you, your Honor.

03:15:22 2 THE COURT: We are going to put dates in today. I
03:15:26 3 can't hold indefinitely all the of the dates that I offered
03:15:30 4 you today, but if you are -- do you envision any more
03:15:42 5 conferences or -- why don't we say we will let people know --

03:15:50 6 MR. EIMER: Well, you mentioned somewhere in the
03:15:52 7 August time frame I think while we were briefing the time
03:15:58 8 issue, you talked about having a status in there somewhere?

03:16:00 9 THE COURT: Right. Yes.

03:16:02 10 MR. EIMER: I think that might not be a bad idea.

03:16:04 11 THE COURT: Which issue was that?

03:16:06 12 MR. EIMER: I think we were in the midst of briefing
03:16:08 13 the time period and the custodian issues.

03:16:16 14 THE COURT: Mr. Mogin, when do you get back?

03:16:18 15 MR. MOGIN: The 24th of August.

03:16:20 16 THE COURT: So that's on a Friday. How would you
03:16:26 17 like to come to Chicago the next week?

03:16:30 18 MR. MOGIN: If I have to, yes, your Honor.

03:16:32 19 MR. EIMER: We were thinking the 28th might be a
03:16:34 20 reasonable time, of August.

03:16:40 21 THE COURT: Could you do Wednesday instead?

03:16:46 22 MR. EIMER: Okay.

03:16:48 23 THE COURT: Can you do Wednesday?

03:16:50 24 MR. MOGIN: I can, your Honor, but can we start a
03:16:52 25 little later so that I am on a reasonable time schedule? I

03:16:56 1 will be adjusting from the Hawaiian time.

03:17:02 2 THE COURT: That's true. We could start at 11:00,
03:17:10 3 1:00.

03:17:10 4 MR. MOGIN: 1:00 would be better.

03:17:12 5 THE COURT: 1:00, August 29. It's kind of
03:17:22 6 undesignated here, but we will kind of hold that.

03:17:26 7 I mean, I suppose we could turn that into Dr. Lewis
03:17:32 8 -- I mean, we can also since we have it reserved --

03:17:36 9 MR. EIMER: Right.

03:17:38 10 THE COURT: -- we could try to do something.

03:17:40 11 MR. EIMER: We could try to take some of the other
03:17:42 12 testimony that day.

03:17:42 13 THE COURT: If we had to.

03:17:46 14 They are clear. They are not pushing for this court
03:17:50 15 to make a finding that either your search method is good or
03:17:58 16 bad. You are not asking for that. What you are asking for is
03:18:02 17 if Mr. Mogin is going to challenge the search methodology,
03:18:08 18 then you'd rather have it now than later.

03:18:12 19 MR. EIMER: Exactly.

03:18:12 20 THE COURT: Is that correct?

03:18:12 21 MR. EIMER: That's exactly correct.

03:18:16 22 MR. MOGIN: As I said, your Honor, if they are asking
03:18:18 23 for that order, they are asking for that finding, then I guess
03:18:22 24 that's correct.

03:18:22 25 THE COURT: But they are not asking for it.

03:18:24 1 MR. MOGIN: Well, they were in the proposed order.

03:18:26 2 THE COURT: Well, Mr. Neuwirth phrased it like that.

03:18:30 3 But okay. So you are going to think about it then, but you
03:18:32 4 cannot -- not that you cannot challenge -- it's not going back
03:18:38 5 to the basic if we had only done computer assisted, we
03:18:44 6 wouldn't be having the trouble we're having right now, okay,
03:18:46 7 because you can't go back. I mean, that is going to be --
03:18:54 8 that particular issue would be one of these things where we
03:18:56 9 are talking about a deal. Okay? You are not going to go back
03:19:00 10 a year from now and say, If you had used computer assisted,
03:19:06 11 you wouldn't be having or it's better than Boolean search.

03:19:12 12 MR. MOGIN: What about if they had used proper search
03:19:16 13 terms, as the plaintiff suggested.

03:19:16 14 THE COURT: What?

03:19:16 15 MR. MOGIN: If they had used proper Boolean search
03:19:22 16 terms such as the ones plaintiffs suggested? Is that part of
03:19:26 17 the mix?

03:19:26 18 THE COURT: I don't know. That's another question.
03:19:28 19 I don't know. I don't know what we need to go back to the
03:19:32 20 hearing for for that. That's more like --

03:19:36 21 MR. EIMER: That's not part of the hearing.

03:19:38 22 THE COURT: Right.

03:19:38 23 Okay. You are going to let me know a week from
03:19:42 24 Wednesday.

03:19:42 25 MR. EIMER: Thank you, your Honor.

03:19:42

1

THE COURT: Anybody have any other issues?

03:19:44

2

Peace, everybody. Have a great weekend.

3

(Which were all the proceedings had in the above-entitled

4

cause on the day and date aforesaid.)

5

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

6

7

Carolyn R. Cox
Official Court Reporter
Northern District of Illinois

Date

8

9

/s/Carolyn R. Cox, CSR, RPR, CRR, FCRR

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25